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The Law of Deposits.



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THE LAW OF DEPOSITS

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1155-10 v. 1, p. 115.

TO HON. FRANCIS FOX OLDHAM,
This volume is respectfully dedicated,
as a token of appreciation.

PREFACE.

This volume is prepared for the special use of bankers and their assistants, the bank clerks, whose sincere and active ambition to improve in efficiency never lags, but whose time is so much occupied with the duties crowded upon them that a general law course is impracticable, while the average law book is incomprehensible. It is hoped that business men will also find it useful.

The author's purpose has been to make a clear statement of the principles governing the law of deposits, explain statutes and, where there is a conflict, indicate to the reader in each state the law in his jurisdiction or the better practice to follow in view of the conflict. Some cases are cited, a reading of which will be profitable; but a general annotation has been omitted, as it would confuse more than enlighten. Most cases cited will be found to be annotated in the reports, and in the National Reporter System the last case is a key to all earlier ones. While the writer has referred to the standard works on the law of banking, such as Morse, Zane, Bolles and others, he has based most of his statements herein on the decisions of the courts as found in the reports of the cases themselves. It is believed that the statements are fully sustained by the authorities.

If the volume is found practical and useful by the banker the author will be more than satisfied. If the legal profession finds it reliable, he will feel well repaid for his labor.

FRED W. WEITZEL.

Washington, March 1, 1910.



CHAPTER I.

DEPOSITS.

I. Relation of Depositor to Bank—Where A delivers to B an article of personal property, which B is to keep for A and return to him when the purpose for which the article was delivered has been accomplished, this is in law called a bailment. A, the one who delivers the thing, is called the bailor; B, the one to whom it is delivered, is called the bailee. The thing which is the subject of the bailment may be left with the bailee for repairs, it may be that the bailee is borrowing it for his own purpose, or it may be that it is simply for safe keeping for the bailor. Where the bailment is made for the benefit of the bailor and the bailee receives no compensation or benefit for keeping the thing bailed, but must return that very thing to the bailor, we have what is properly called a deposit, and such is the special deposit.

A general deposit of money in bank differs much from such deposit as is mentioned above. In the case of the bailment the thing deposited remains the property of the bailor and if the bailee use the thing for any purpose other than that for which it was delivered, he will be liable for trespass or conversion. If the thing be destroyed without the gross negligence of the bailee the loss will be on the bailor. With an ordinary deposit in bank, however, a different legal relation arises. The depositor does not expect to receive back the identical pieces of money, as in the case of the bailment. He expects to receive money of equal value, or a credit, and the bank becomes indebted to him for the amount of the deposit. While a deposit is, in effect, a

loan of money to the bank, there are some differences between a loan and a deposit. By various regulations of the business of banks the law places restrictions upon the use which a bank may make of its deposits, while one may make any use he pleases of money he borrows.

2. **Classes of Deposits**—Bank deposits are usually divided into three classes: general, special and specific.

GENERAL DEPOSITS.

3. When a party opens an account by depositing money, and when a regular customer makes a deposit, unless there is an agreement to the contrary, the bank mingles the amount received with its other funds, the entire fund is the property of the bank, and the depositor becomes, not a bailor, but a creditor of the bank. The relationship, therefore, between a bank and its general depositors, is that of debtor and creditor. The bank is indebted to the depositor in the sum of his deposit and the bank is the absolute owner of the money which it has accepted as soon as the same has been passed over the counter. The depositor has no right to any specific money. He has only a claim against the bank as a general creditor. *Bank of Blackwell v. Dean*, 9 Okla., 626; *Butcher v. Butler*, 114 S. W., 564, a Missouri case; *Burton v. U. S.*, 196 U. S., 283. A deposit will be presumed to be intended as a general deposit unless there is an agreement to the contrary, especially where loose money is deposited. If a sealed box, bag or package, or marked envelope containing money were deposited it would be reasonable to presume that it was intended as a special deposit, but evidence of a custom or of intent would be admissible to show whether it was actually a general deposit. Loose money or paper deposited without any agreement or custom to the contrary will be presumed to be a general deposit.

4. **In Case of Insolvency**—In case of insolvency of the

bank, every general depositor is a creditor of the bank. Technically every creditor is a general creditor. If one is entitled to payment in full it is either because the bank holds a special deposit or security, which has always remained his property, the bank being a bailee under an agreement, or because the bank has violated a trust and by reason of the wrong holds a special fund which belongs to the owner. In a national bank all general depositors and other creditors share alike. In some States the depositors in State banks are by statute preferred over other creditors and are paid in full before other claimants of an insolvent bank.

5. Frequently when a bank fails attempts are made to establish rights to preferences by showing that certain deposits were "special deposits." But the ordinary manner in which banks do and in these days must do, their business, to satisfy the demands of commerce, facilitate negotiations and meet the customs which present day business methods require, and the general intentions of those who do business with banks, when sifted out, will show the fallacy of this clamor for preferred payment of claims, as well as the obvious injustice of the claims. See Sec. 198 et seq.

6. Even though money is deposited for a specified time, or upon unusual conditions, if there is no understanding that the money is not to be mingled, the bank will mingle the amount received with the general mass of its property, and in most States, the deposit is a general one, to be repaid out of the general mass of the bank's assets.

7. One who purchases from a bank a draft drawn on another bank has a claim on the draft only, and not upon the specific money which he paid for the draft, unless the bank official who issued the draft knew when he drew it that there were no funds in the bank upon which drawn to meet it. This of course would be a fraud, and if the purchase money could be traced the purchaser would have a right to recover it. Where, however, a customer of the

bank purchases a draft and pays for it by check on his account in the same bank, if the draft is not paid, even though the officer knew when he issued the draft that it would not be paid, the customer would still remain a general creditor. He has simply failed in an attempt to withdraw from his account the amount of the draft purchased. The bank received no actual cash from him. It was a bookkeeping transaction only. He was a general creditor when he purchased the draft, and the draft being worthless he is still a general creditor. *Clark v. Toronto Bank*, 82 Pac., 582, a Kansas case.

8. If A deposit money in bank to be paid to B, upon a contingency, this is a general deposit unless there is an agreement that the identical money will be kept separate and paid to B. As to whether A or B would be the proper claimant we will discuss hereafter. See Sec. 37, 39c.

9. Frequently one who is already a depositor in a bank, for his own convenience, or to prevent confusion, will open another account as "attorney," "agent," or "trustee," etc. It may be that he is treasurer of some organization and wishes to keep the fund as treasurer separate from his own moneys. As to the depositor this is a special fund, but it is not the creation of a special fund as between himself and the bank, except that checks drawn on his personal account cannot be charged against the special account, and vice versa. It represents an account of a general creditor and in case the bank failed there would be a general claim only.

10. Where an officer of a State or of the Federal Government is not prohibited by law from depositing his money as such officer in bank, and he does deposit it, this is a general deposit. A case recently decided in Oklahoma holds that where the officer did not have authority, though not prohibited, the deposit was wrongfully made and when the bank failed the fund was held to be a trust fund and paid prior to other creditors. This case is contrary to the de-

cisions in other States and was not well considered. *Watts v. Board of Com'rs.*, 95 Pac., 771; *In re Salmon*, 145 Fed., 649, and see Par. 27b. Usually security is required to protect the Government and the officer is held personally liable, but as to the assets of the bank there is only a right to share with other creditors. If the law prohibits the deposit by an officer, the bank is guilty of a wrong in receiving such deposit and where the money can be traced it can be recovered in full.

11. If money be deposited in bank to A's credit, A intending to use the money for a special purpose, this does not alone make it a special deposit. It is not any special purpose, use or trust which A impresses upon the deposit which makes it a special deposit. No matter what A might intend to use the money for, it is a general deposit unless otherwise made special.

12. One who holds a certificate of deposit is a general creditor, except where he is given preference as a depositor in a State or savings bank under the State law.

13. **Deposit a Debt**—After the deposit has been made, the indebtedness of the bank is absolute until payment. The title to the money passes to the bank and, though the identical pieces of money be stolen, embezzled or destroyed before the deposit is mingled with the other moneys of the bank, the bank is indebted to the depositor just the same. If the bank be insolvent when the money is received, yet the money becomes the property of the bank and the depositor becomes a creditor to that extent, unless the officers knew that the bank was actually insolvent at the time the money was received. If a bank receive deposits after business hours and hold same over till the next day, and the bank fails to open the next day, the deposits should be returned, unless the bank was in the habit of receiving deposits after usual business hours, when they would be regarded as having been accepted on that day.

14. Forged or Counterfeit Paper.—If forged or counterfeit paper or money be deposited, even though the amount purporting to be represented by such deposit has been credited to the depositor, the depositor is entitled to no credit and the amount can be charged back to his account. The paper or money being worthless, no consideration passed to the bank for the credit given and the bank is not bound thereby. See Sec. 88e, 112, 138.

SPECIFIC DEPOSITS.

15. A specific deposit is where money is deposited with a bank with specific instructions to apply the money in a certain way, as to pay a note of the depositor, or to credit to some one else, or to take up a mortgage, etc. In such cases the bank must follow instructions and use the money for the purpose for which it was deposited, and if it does not do so, or misapplies the fund, the money can be recovered, provided the bank received money, or collected money from paper received and it can be traced. See Sec. 201.

Where money is deposited in Bank A, to the account of Bank B, with instructions to telegraph the amount to Bank C, this is a specific deposit. It is not a special deposit, for the reason that it is not to keep the money or deliver the identical pieces to C, and it may mingle the money received with its other funds, but it must telegraph a like amount to Bank C. It is not a general deposit because there is a duty to perform, and if it violates this duty it will not be indebted to the depositing bank, but will be deemed a trustee with a fund of \$1,000 in its hands belonging to Bank B by reason of the wrong committed. If the \$1,000 remains in Bank A, or there is on hand a like amount which cannot be proved to have come in afterwards and to have some other trust attached, it can be recovered.

16. Items deposited with a bank for "collection only,"

money collected by the bank as agent and money deposited for the purpose of having the bank send, lend or pay the same, also papers delivered to the bank as security, are the property of the depositor, and if the bank violates its duty, or fails before it has had an opportunity to perform the duty, and the items or the proceeds thereof remain in the bank at the time it is closed, or come in after the bank has been closed, they should be returned to the depositor in full. So where a bank, the officers not being certain as to its solvency, keeps out deposits and marks them with the depositors' names, and the bank is found to be insolvent and closes, the deposits so held out should be returned in full. In any case there can be no return, or payment in full before other creditors, unless the item or money can be traced into the hands of the receiver. *Commissioners of Crawford Co. v. Strawn*, 157 Fed., 49. See Sec. 201.

17. Change From One Class to Another—A general deposit may, by agreement or order, be changed to a special deposit or a specific deposit. Likewise a specific or a special deposit may be changed to a general deposit, a specific deposit to a special, and a special to a specific.

Where a general deposit is ordered to be changed to one of the other class, however, the depositor remains a creditor until the change has actually been made and the money actually separated in the case of a special deposit, and the appropriation actually made by the bank in the case of a specific deposit. This is because the bank does not actually receive money, but changes a credit of the general depositor into a fund.

SPECIAL DEPOSIT.

18. Where bonds, stocks, or other valuables, or money in a separate package (or even loose money where the identical pieces are to be kept) are placed with a bank, to be

kept and the identical articles returned, we have a special deposit. The owner has the right to have the specific articles returned, and if the bank has made any profit by a wrongful use of articles, the depositor, who is in this case a bailor, is entitled to receive the profits also. The main function of the bank, in the beginning, was the safe keeping of valuables in this way, but in our times the safe deposit vaults are used for this purpose.

19. Power of Bank to Receive—A bank has power to receive special deposits. Although the right of a national bank to do so was questioned at one time, the power is now regarded as one of the incidental powers of the bank. The National Bank Act impliedly authorizes the taking of special deposits, for Section 5228 of the Revised Statutes of the United States provides for delivery of special deposits by banks which have defaulted in payment of circulating notes. Some of the States expressly authorize the State banks to receive special deposits.

20. Liability of Bank For—Where there is a special deposit the very thing deposited must be returned to the depositor, or held for the special purpose for which it was made. In the case of a general deposit we learned that the bank was debtor and the depositor creditor for the amount. Not so here. The bank is bailee and the property remains the property of the depositor, or a trust fund for the purpose for which it was made. If the bank use such diligence as a prudent man would use in attending to like affairs the bank will not be liable for a loss. In fact, in some States it is held that only such diligence need be exercised as the bank uses in its own affairs. Where the bank uses care in selecting its officers and employees and trusts its own property to them along with the property of the special depositor, and the officers or employees, outside of their line of duty, steal or embezzle the special deposit, the bank will not be liable. If the bank knew, or ought to have known, that the

employee or officer was dishonest, or might have known by using such care as a prudent man would use in such cases, I think the bank would be liable. While some cases have held that only such care as the bank uses in its own affairs need be exercised, banks nowadays usually have strong safe deposit vaults and facilities for keeping valuables, and they also usually have men whose reputation for honesty and integrity induces customers to make such deposits. The depositor having the right to feel secure, the bank ought to be called upon to use more care in the selection of its officers and employees than some banks do, and it ought to be held to the care that a prudent man would exercise. And the decisions are tending in that direction. Of course where the bank is compensated, or receives a direct benefit by accepting the special deposit, it will be held to a greater degree of care than where it performs the service of safe keeping without compensation.

21. **Returning**—If the bank is negligent and delivers the special deposit to the wrong person the bank will be liable. As where a bank delivers to a depositor's wife a special deposit, without requiring the production of the receipt or an order from the depositor; and where an order calling for coupons from bonds specially deposited is not carefully read and the bonds themselves delivered to the bearer of the order, the bank will be held liable.

22. **Not Assets of Bank**—As the bank is merely a bailee of property specially deposited, the title remains in the depositor and cannot be counted as assets of the bank for any purpose.

23. **When Is A Deposit Special?**—In speaking of general deposits it was pointed out that many deposits ordinarily termed "special" are really general deposits. An express agreement when special deposits are taken would save trouble for all parties concerned. When there is no agreement or custom, a deposit of loose money or

paper will be regarded as a general deposit (leaving out the consideration of the question of collections), and a package, box or bag of money, sealed, or of other valuables, would be presumed to be a special deposit, to be held separately by the bank.

24. **What May Be Subject of Special Deposit**—Anything which a bank consents to receive on special deposit may be the subject of such deposit. *First National Bank of Carlisle v. Graham*, 100 U. S., 699. *Preston v. Prather*, 137 U. S., 604. *Butcher v. Butler*, 114 S. W., 564.

CHAPTER II.

THE DEPOSITORS.

25. Deposits, when classified according to the depositors for whose accounts they are carried, may be divided into individual, bank and public deposits.

All deposits by private individuals as such, by individuals as representatives of other individuals or bodies of individuals, by companies, firms, corporations, partnerships, etc., are individual deposits.

The general legal status of an individual depositor is no different from that of a bank which deposits in another bank, but as the national and state banking laws provide the manner of keeping reserves, public deposits, and deposits in other banks, and the banking authorities of the state and federal governments require separate accounting in regard to these different items in the reports made by banks, they are divided into individual deposits, public deposits, deposits in banks which are reserve agents and deposits in banks not reserve agents, etc. A subsequent chapter deals with reserves.

Except where otherwise noted, the principles stated herein relate to all deposits, whether individual deposits or deposits by banks.

26. **Bank May Select Its Depositors**—A railroad generally must accept such business as is tendered it; a hotel keeper admit all comers; i. e., they cannot at their own pleasure accept or refuse to accept passengers or guests. A bank, however, while it is in the nature of a public institution (called quasi-public), need not accept deposits tendered it unless it wishes to serve the one mak-

ing the tender, and if a bank does not wish to retain the deposit of one who has been a depositor, it may close the account, tender him the balance due and refuse to receive further deposits from him. Likewise the depositor may terminate the relation at any time he sees fit, by withdrawing his balance, unless the bank has some lien or right of set-off against it, or there is a contract whereby the money must be left for a specified time. In the latter case, however, it would be a loan and not a deposit. *Thatcher v. State Bank*, 7 N. Y. Sup. Ct., 121.

27. Deposits of Public Moneys—The State statutes provide the manner in which deposits of public funds of the State, county or city shall be kept. These statutes should be carefully followed by the officers making deposits and by the banks receiving them. If the State law gives the county the right to make any regulations, or empowers the city, by its municipal government, to make ordinances regarding the keeping of the funds, all these should be carefully complied with. Be sure that the officer who makes a deposit of public moneys has authority to deposit it, and then be sure that he has authority to make the deposit in your bank. In some States the officer who holds public money is personally responsible for it, in which event he may, but ought not, treat it the same as his own money. In some States he is neither expressly authorized nor prohibited from depositing funds in banks and is not held liable if he uses care in selecting the bank, and in watching the conduct of the bank and its condition. If he has no discretion in making the selection, but must deposit in such depositary as is designated, he will not be personally liable if he obeys the law and the designated depositary fails. In case the officer is personally liable and makes good to the government, he will have a claim against the bank for the deposit. In that event, the money being

his own, he could offset it against a private debt due the bank.

27a. Public deposits should always be carried as such, both for the protection of the bank and its creditors, and for the protection of the officer.

27b. It has been held that where a public officer is prohibited by statute from "loaning" the public funds, he will not be liable for a violation of the statute if he deposits the money in bank, even though at interest, provided the money is always subject to his order. *Baker v. Williams & England Banking Co.*, 70 Pac., 711, 42 Oregon, 213. If it is made unlawful by statute for him to deposit the money in bank or in any but designated banks, and a bank not authorized receives a deposit from him, the bank will be liable to the State as a trustee with funds of the public, and the amount can be recovered in full. *Brown v. Sheldon State Bank (Iowa)* 117, N. W., 289. If the bank be insolvent, however, only so much as can be traced can be recovered in full, and the government is creditor for the balance. *Commissioners of Crawford County v. Strawn*, 157 Fed., 49.

28. There is nothing in the laws relating to national banks which will prevent a national bank from becoming the depository for State, county or city moneys. The question is whether the laws of the State allow or prevent deposits in national banks. *Bank v. Ferguson*, 48 Kan., 732.

29. **Public Moneys of the United States**—The Revised Statutes of the United States provide as follows:

Sec. 3620.

"It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement to deposit the same with the Treasurer or some one of the assistant treasurers of the United States, and to draw from the same only as it may be required for payments to be made by him in pursuance of law; and draw from the same only in favor of the persons to whom payment is made,

and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasurer or assistant treasurer of the United States. In places, however, where there is no Treasurer or assistant treasurer, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in any other manner and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors."

It will be noted that the above section permits the Secretary of the Treasury to authorize deposits in other public depositories in places where there is no Treasurer or Assistant Treasurer. These depositories must have been previously designated by the Secretary of the Treasury as provided by Sec. 5153 of the Revised Statutes of the United States, as amended by the act of March 4, 1907:

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositories of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depository of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections."

30. The regulations of the Treasury Department provide, under the statutes, how public deposits shall be received and kept. Any national bank desiring to be designated should write to the Secretary of the Treasury

for information as to how it should proceed to be designated and authorized to act as a public depository. The Treasury Department furnishes no forms for application, but if an application is received by the Department the applicant will be advised whether it is worth while seeking designation. Local necessity for such depository and the political and public backing count for much. If designated full instructions will be furnished.

31. Since the act of May 30, 1908, national banks acting as depositories must pay at least 1% interest on public deposits.

Sec. 15, Act of May 30, 1908:

"That all national banking association designated as regular depositories of public money shall pay upon all special and additional deposits made by the Secretary of the Treasury in such depositories, and all such associations designated as temporary depositories of public money shall pay upon all sums of public money deposited in such associations interest at such rate as the Secretary of the Treasury may prescribe, not less, however, than one per centum per annum upon the average monthly amount of such deposits: *Provided, however,* That nothing contained in this Act shall be construed to change or modify the obligation of any association or any of its officers for the safe keeping of public money: *Provided further,* that the rate of interest charged upon such deposits shall be equal and uniform throughout the United States."

32. **Deposits By Certain Postmasters**—Section 3847 of the Revised Statutes of the United States provides that:

"Any postmaster, having public money belonging to the Government, at an office within a county where there are no designated depositories, treasurers of mints, or Treasurer or assistant treasurers of the United States may deposit the same, at his own risk and in his official capacity, in any national bank in the town, city, or county where the said postmaster resides; but no authority or permission is or shall be given for the demand or receipt by the postmaster, or any other person, of interest, directly or indirectly, on any deposit made as herein described; and every postmaster who makes any such deposit shall report quarterly to the Postmaster-General the name of the bank where such deposits have been made, and also state the amount which may stand at the time to his credit."

33. Where a postmaster has funds thus deposited they

are at his own risk. If the bank fails the Post Office Department looks to the postmaster for payment, though he must carry the account not as an individual personal account, but as "Postmaster." Neither the United States nor the postmaster can claim payment in full before other creditors are paid by the receiver. While the bank is liable if it permits the postmaster to make an improper use of the money, yet, if the bank fails, there is no "trust fund" which must be paid before other creditors, unless the money can be followed into the hands of the receiver. If the bank has given security for the deposit the security can be sold and the Government make a claim also for the amount of the deposit, as a general creditor. It may be that the amount realized from the security, together with pro rata dividends on the full amount of the deposit, will more than pay the claim, in which event any excess must be returned; but if the security does not bring sufficient to pay the claim, for the balance, the Government, like any other creditor, must rely upon the dividends for payment. And the United States is not a preferred creditor on any claim it may have. *Cook Co. Nat'l Bank v. U. S.*, 107 U. S., 445. But a lien attaches on all the assets of a national bank until the circulating notes are paid or provided for.

If the postmaster settles with the government he has himself a claim against the bank and in that event, being himself a creditor of the bank, he could offset this claim against any debt he personally owed the bank. Until he has settled with the Post Office Department, however, the United States has the right to the dividends on the deposit.

Note that this section deals with postmasters within a county where there are no designated depositaries, treasurers of mints, or Treasurer or assistant treasurers of the United States. On these deposits the postmaster

and every other person is forbidden to demand or receive interest.

34. The only other sections of the Revised Statutes which it is necessary for us to notice here, as relating to public moneys of the United States, are Sections 4046, 5488 and 5497:

Penalty for Misapplication of Money Order Funds—
Sec. 4046:

“Every postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money-order office who converts to his own use, in any way whatever, or loans, or deposits in any bank, except as authorized by this Title, or exchanges for other funds, any portion of the money-order funds, shall be deemed guilty of embezzlement, and any such person, as well as every other person advising or participating therein, shall, for every such offense, be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled; and any failure to pay over or produce any money-order funds intrusted to such person shall be taken to be prima facie evidence of embezzlement; and upon the trial of any indictment against any person for such embezzlement it shall be prima facie evidence of a balance against him to produce a transcript from the money-order account books of the Sixth Auditor. But nothing herein contained shall be construed to prohibit any postmaster depositing, under the direction of the Postmaster-General, in a national bank designated by the Secretary of the Treasury for that purpose, to his own credit as postmaster, any money-order or other funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such bank, or through United States disbursing officer, or otherwise, when instructed or required to do so by the Postmaster-General for the purpose of remitting surplus money-order funds from one post-office to another, to be used in payment of money-orders. Disbursing officers of the United States shall issue, under regulations to be prescribed by the Secretary of the Treasury, duplicates of lost checks drawn by them in favor of any postmaster on account of money-order or other public funds received by them from some other postmaster.”

35. Unauthorized Deposit of Public Money—Sec. 5488.

“Every disbursing officer of the United States who deposits any public money intrusted to him in any place or in any manner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the Treasurer or any assistant treasurer, or any authorized depository, or for any

purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied; and shall be punished by imprisonment with hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment.

35a. Unauthorized Receipt or Use of Public Money— Sec. 5497:

"Every banker, broker, or other person not an authorized depository of public moneys, who knowingly receives from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or who uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law, and every president, cashier, teller, director, or other officer of any bank or banking association, who violates any of the provisions of this section, is guilty of an act of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be punished as prescribed in section fifty-four hundred and eighty-eight."

36. Trust Funds—Generally an executor, administrator, guardian, etc., has authority to deposit funds in bank, temporarily, awaiting investment or order of court, and if he uses care in selecting the bank he will not be personally liable in case the bank fails. Statutes relating to the particular office should always be examined and closely followed. Where a bank rightfully received such deposits, as has been said before, while the depositor may be a trustee, as between the bank and the depositor the fund is not a trust fund but simply an amount due a general creditor. No one has a legal right to the deposit but the trustee, administrator, executor, guardian, etc., who rightfully deposited same. These hold the legal title for the benefit of those whom they represent. Where an administrator, executor, guardian, trustee, or any person acting in a representative capacity, deposits

funds which are not his own, but which belong to the person, or body of persons whom, or the estate which he represents, he should, to protect himself (and the bank should require for its protection that he do so), deposit the money, not in his individual account, but in an account designated as the account of the person, body of persons or estate represented. For example, if John Smith is executor of the Estate of James Smith, the money should be deposited in an account designated "Estate of James Smith, John Smith Ex." "John Smith Ex. of the Estate of James Smith" would do, but the other is better. If John Smith represent James Smith as trustee, guardian, agent, attorney, receiver, or otherwise, the same rule should be followed.

While it has been held that the addition of the word trustee, agent, etc., would not in itself give a bank notice, upon receiving a deposit for credit to such account, that the money is a trust fund, it is a general principle of the law of trusts that a trust fund, if misappropriated, can be traced and followed into the hands of another. In Missouri it is held that the addition is simply a description of the person. In better considered cases, however, it is held that the word "trustee" is not meaningless, and that the bank is put upon notice that the deposit is not individual money of the depositor, especially where the depositor keeps an individual account also. One case holds that the word is a description of the fund deposited. The bank should require information which will enable it to determine whether the money is the property of the person deposited or of some one whom he represents. Having received the deposit it must pay to the one whom and upon order drawn in accordance with, the understanding had when the deposit was made. This, however, will not relieve the bank from liability where it should have used reasonable care at least to ascertain the

facts. Where an executor, administrator, guardian or committee, etc., is appointed, evidence of the appointment should be submitted to the bank. Where the authority is given by a court, the appointment or a copy, certified by the clerk of the court, is the best evidence. Where it is an officer of a corporation or committee of some kind, some official, written direction from the corporation or society represented should be filed with the bank, showing to whom the money belongs and who has authority to withdraw the same. The bank is still more in peril when making payment on such accounts. See Sec. 179. It should not pay from such account on the individual check of the depositor, with the understanding that he will make it good; for, even though he owe the bank on his individual account, any deposit he may make thereafter will have to be applied in restoring the amount wrongfully withdrawn and cannot be applied against his debt. If A have an account under his name, A, and another account "A, Trustee," and he give a check to C drawn against account "A, Trustee," the bank must pay the check, even if it be drawn for payment of an individual debt of A's, if the bank does not know it is an individual debt; but if the bank paid directly to A when it knew A was using funds of his trust for his private purpose, or accepted a check for A's indebtedness to the bank, the bank would be liable. If "A, Trustee," draw a check against the account, payable to "A," transferring the amount of the check to A's individual account, without the bank's having knowledge of a wrong, the bank would have to honor the check. While a mere reason to believe depositor is misapplying trust funds cannot make a bank liable, the trend of decisions is toward demanding of the bank more care in informing itself when suspicious circumstances attend checking against funds of which the depositor is trustee. *Union Stock Yards Nat'l Bank v. Gil-*

lespie, 137 U. S., 411; Nat'l Bank v. Insurance Co., 104 U. S., 54.

A late case is Havana Central R. R. Co. v. Knickerbocker Trust Co., 119 N. Y. S., 1035. The treasurer had drawn a check against the account as treasurer, payable to his own order, and deposited it in his individual account. The bank was held to have notice that he was using the company's money.

CHAPTER III.

MAKING, RECEIVING AND KEEPING THE DEPOSITS.

37. **To Whom Made**—Care should be exercised by depositors when leaving their money at the bank. The broad statement is made in one of the books that money paid to anyone behind the counter will bind the bank. While it is true that money deposited with one to whom it has been the custom to pay is payment to the bank, and while the president and cashier are generally authorized to receive deposits, and acceptance by them would bind the bank, yet where there is a receiving teller it is safest to deposit with no one else. If a deposit is made with one not authorized to receive it, the person to whom it is paid will be regarded as the agent of the depositor and not as the agent of the bank, and if the money is misappropriated it will be the depositor's loss. Of course if the party to whom it is paid sees that it reaches the proper place in the bank, then the bank is bound. Deposits should always be made in the banking room.

38. **Pass Books—Entries**—The bank usually furnishes depositors with a book, called a bank book, or pass book. On making a deposit the depositor enters upon a slip the various items and hands the deposit, the slip and the book to the officer, who, after verifying the deposit, enters the amount in the pass book.

38a. The rule once was that the entry made by the officer of the bank was binding upon the bank, but not on the depositor, if made at the same time that the deposit

was made. It was not binding upon the bank if the book was afterwards written up. Now, however, the general rule seems to be that it is the amount actually deposited that the bank is liable for and the fact as to what the actual amount was may be proved by evidence other than the pass book and deposit slip, though these would be evidence of a high character. It is not even necessary that there should be a ticket made out or an entry in the pass book, if it can be proved that the deposit was actually made; but the bank should always require the deposit slip and make the entry. No by-law of the bank can bind a depositor to accept as correct the amount entered by the teller, or relieve the bank from liability for a deposit actually received by the bank without a deposit slip or entry in the pass book. The amount shown by a deposit slip and by an entry in the pass book would be presumed to be correct until shown to be incorrect, but evidence can be introduced to show that either the bank or the depositor has made an error. *First Nat'l Bank v. Whitman*, 94 U. S., 343; *Schwartz v. Bank*, 116 N. Y. S., 701.

38b. The pass book held by a depositor is evidence of his deposit, but it is not negotiable. The amount as shown by the pass book cannot be transferred to another by endorsement (the writing of depositor's name on) and delivery of the book merely.

And the assignment of a deposit slip does not in itself give the one to whom it is assigned the property in the deposit. *Talcot v. First Nat'l Bank*, 53 Kansas, 480.

38c. When a deposit is made by a depositor who has not his pass book, a duplicate deposit slip should be made out, marked "Duplicate," signed by the teller and delivered to the depositor as evidence of the deposit made. This slip is not negotiable. If the amount is raised the alteration constitutes a forgery.

38d. Balance and Return of Pass Book—Where a pass book has been balanced by the bank and returned, with paid checks, to the depositor, the rule as to how soon after the return the depositor must report any error or forgery to the bank is not settled, except that the error must be reported “within a reasonable time.” In New York, where there has been a forgery the statute gives the depositor one year, after return of the paid check to him, within which to notify the bank; in South Dakota three months is the limit. What is a reasonable time within the balance as stated by the bank, upon the return of the pass book, must be objected to, will depend upon all the circumstances surrounding the return of the book and the discovery of the error. Ten days, a month, and under some circumstances even six months would not be unreasonable. The question is whether there has been diligent and careful verification made of the book and vouchers when returned. In New York and in Missouri it has been held that unless the bank has been damaged by the depositor’s delay in discovering the error the depositor ought not to have to suffer the loss, even if the discovery is made a long time after, and it might seem to be justice that the depositor should not be punished for not discovering the error, so long as the bank has not lost by his delay. In the United States Courts, however, the rule is that the bank will be presumed to have been damaged by the depositor’s delay. But the presumption can be proved to be wrong. Where a depositor is prompt in verifying the bank’s statement of account it is generally possible to correct an error. On the other hand, if circumstances require a speedy verification, the depositor certainly ought to be held for any loss caused by his delay.

If A, being a depositor in bank, entrusts the matter of verifying the bank’s statement as to his balance to his

clerk, X, and X, who has himself forged or raised checks of A's, fails to report the difference in the balance as stated by the bank and the true amount due, should the depositor be bound by the bank's statement of account? A might not look into the matter of his bank balance, or examine the paid checks, for years, and perhaps might learn by some other incident, that X at one time forged or raised checks. The general law of agency, that the knowledge of the agent is imputed to the principal would require a holding that X knowing of the forgery, A should be bound by X's knowledge. It could hardly be expected that X would report his own crime. In such cases in Pennsylvania, Massachusetts, Alabama and, it seems, in New York, the depositor will be bound unless the bank is notified of the forgery within a reasonable time. In Missouri and Maryland the rule is that the principal can recover from the bank, in such case, even a long time after the forgery, where the examination of the book upon its return by the bank was made by the one who committed the forgery. No reason appears why the principal should not stand the loss for such a wrongful act of his agent the same as he would for any other wrongful act of the agent performed in the scope of his authority, and the bank should not be called upon to stand a loss where not notified within a reasonable time. And doubtless the reasonable time allowed the depositor would be extended a little in view of the circumstances. In Illinois six months was held a reasonable time, and the principal was allowed to recover where his agent acquiesced in the bank's statement of account, which included payment of forged check, even though the book had been several times balanced. The Court said the account was stated for the depositor's protection, not for the bank's. A recent case is *National Dredg-*

ing Co. v. President, etc., Farmers Bank, 69 Atlantic Reporter, 607. A Delaware case.

38e. Examination of Books of Bank—It has been held that the officers of the bank, having charge of the books, are considered the agents of both parties—the bank and the depositor—and that the depositor is entitled to examine and the bank bound to produce the books of the institution on all proper occasions. While there seem to be a proper occasion for a depositor to request an examination of his own account upon any controversy arising over his account with the bank, the courts would doubtless deny a depositor the right to examine into the books of the bank generally. While it would probably be just, both to the depositor and the holder of a check, for the bank to give the state of the depositor's account when a check for more than his balance is presented, and payment refused because there are not sufficient funds, it is doubtful whether a bank has the right to disclose to any third party the condition of a depositor's account, without making itself liable to the depositor, though in Kansas the court has held that the bank must give information as to the state of a depositor's account when testifying before the grand jury. In *re Davis*, 68 Kansas, 791. Of course, if a creditor of the depositor brings attachment proceedings, the bank must disclose the amount due the depositor. And if summoned as a witness, an officer of the bank would have to disclose the state of a depositor's account, if the fact were otherwise relevant to the issue. He could not refuse to disclose it on the ground that it was a confidential communication. See Sec. 109.

39. Who is Entitled to Deposit—When A deposits money in bank to his account the law will presume that it is A's money and the bank cannot deny his ownership and appropriate the money to the payment of the obliga-

tion of some one else to it, or transfer it to another account because it claims the money belongs to somebody else. As between the depositor and the bank the former is the true owner until the bank has legal authority to pay to someone else. If a third party claims the money, such claimant should use the proper legal method of enforcing his right, and after notice that the money is adversely claimed the bank should not use any wrongful method to prevent the rightful owner from recovering his money, but if the claimant does not use reasonable diligence in proving his right, the bank would be justified in paying the money upon the order of the depositor. Of course, if the bank has actual knowledge that the money belongs to someone else it will be liable to the true owner if it pays to the depositor. If X deposits money in bank and before X draws it out A notifies the bank that the money belongs to him (A) and offers to indemnify the bank if it loses anything by refusing to pay X, the bank will be liable to A if it pays to X and A establishes his right to the money. The true owner of a deposit is always entitled to it. *Stair v. York Nat'l Bank*, 55 Pa. St., 364.

39a. If A deposits money in bank under the name B, under an agreement with the bank that it will pay out the money on his checks signed "B," he can withdraw it on checks so signed. The bank will be discharged so long as it pays checks according to the contract and so long as it has no knowledge that the money belongs to some one else. *Davis v. Lenawee Co. Sav. Bk.*, 53 Mich., at 166.

If A, without any agreement with the bank, deposits money in B's name, and it is for a legal purpose and for the benefit of B, even though B had no knowledge that the deposit was being made, B would have the right in most States to claim it, when he learned of it. If the

bank paid to A or any one other than B so long as it stood in B's name, payment would be at its peril. If the bank paid B under such circumstances it would be discharged. In some states notice must be given to B to entitle him to the deposit, as between B and A or A's representatives or creditors. If, however, A deposits in B's name, in order to hide his assets from his creditors, or to escape taxation, or for any other illegal purpose, B would not have any right to it. See chapter on Gifts.

39b. If A deposits in bank money belonging to B, no matter under what name, B is entitled to the deposit and can recover same, and if A is indebted to the bank it cannot use B's money to pay A's debt. If, however, B knows that A has so deposited the money and consents, B would be a general creditor in case the bank failed. If A so deposits without the consent of B a trust fund is created. There is a trust relationship between A and B. If the bank does not know of A's wrong, the money cannot be recovered by B unless it can be traced. If the bank knew of A's wrong it will be liable to B whether the money can be traced or not, in full. If the bank is insolvent, however, the money cannot be recovered by B, even though the bank knew of A's wrong, unless the money can be traced. It would be an injustice to other creditors. A would be liable personally to B. If A steals from B any article which can be identified, B can recover the stolen goods in the hands of any person. Money, however, cannot be identified and, therefore, if it passes out of the hands of the thief it is gone. In case of a bank deposit, so long as it has no notice of a wrong the bank is not concerned as to where the depositor obtained the money and is liable to him only until the true owner proves his right, but when he does prove that it was his money the bank owes it to him and not to A. If it pays it out to A before it has any notice

of A's wrong it is discharged and is not liable to B. In some states money won at gambling, if deposited by the winner, can be recovered by the loser as his money and a check given for a gambling debt in those states is void, and if paid by the bank the bank can be called upon to make good to the depositor. In most states, however, the bank is not held to the same responsibility, is not concerned with the source of the deposit or the object of the order drawn on it, so long as it receives and pays without notice. *Wright v. Stewart*, 130 Fed., 914; *Armstrong v. Bank*, 133 U. S., 433.

39c. Deposit on Condition.—Where money is deposited under an agreement that it is to be paid only on fulfillment of a condition, the bank cannot pay until that condition has been complied with. *Insurance Co. v. Trust Co.*, 115 N. Y. S., 503. If A makes the deposit to be paid to B when B has complied with a condition, if B fails to comply with the condition, the money should be returned to A upon his demand. *Bank v. Harding*, 1 Kan. App., 389. And payment to A discharges the bank from further liability. *McGorray v. Loan Society*, 131 Cal., 321; 63 Pac., 479. But where B has met the condition the money becomes his and, in the absence of a different understanding, B stands in the relation of a depositor to the bank. (Mo.) 111 S. W., 574.

40. Certificates of Deposit—Where it is desired to make a time deposit or only a single deposit the bank usually, in consideration of being assured that it will have the use of the money for a stated period, will allow interest. Such deposits are not entered on the general or checking account of the customer and are carried in a "Certificate of deposit" account. As evidence of such deposit a certificate is issued. This certificate is called a certificate of deposit. A certificate of deposit, therefore, is a paper issued by a bank acknowledging receipt

of money deposited. A certificate of deposit can be used as collateral, or it can be transferred in most instances by endorsement, while a pass book cannot.

Most certificates of deposit contain a promise to repay, on demand, or at a certain future date, or upon return of the certificate properly endorsed. A common clause in the certificates is that interest will be paid at a certain rate, if the money is left a specified time.

41. A Negotiable Instrument—In their usual form, acknowledging receipt and promising to repay to the depositor “or order,” or some other person “or order,” “or bearer,” these certificates have generally been regarded as the negotiable promissory notes of the issuing bank. In some states, including Pennsylvania and Massachusetts, a certificate of deposit is not regarded as negotiable.

To be negotiable an instrument must comply with the requisites for negotiability as provided by the laws of the state. It must contain an unconditional promise to repay, to bearer, or to order, a sum certain in money, on demand or at a time certain, the same as any other negotiable instrument. Therefore, if a bank issues to A a certificate stating that “This is to certify that A has to his credit \$500,” this is not a certificate of deposit. It is evidence of the bank’s indebtedness to A.

42. In those states where a certificate of deposit is regarded as the negotiable promissory note of the bank, the bank cannot issue such certificate if it is prohibited from issuing promissory notes.

43. As the certificate usually recites that it will pay “on return” of the certificate, it is generally held that the certificate must be presented at the bank, though in one or two instances it has been held that the bank must find the holder and pay him. It is a general principle of law that the debtor must seek the creditor. But it would seem that the certificate ought to be interpreted to mean

what it says on its face, and as the bank promises to pay "on return," the bank is the place where the certificate should be payable. The certificate should be surrendered upon payment.

44. The statement in the books that a certificate of deposit need not be endorsed to be negotiated is misleading and is based on a case which decided that if A deposits \$100 belonging to B, and the bank, knowing it is B's money, issues a certificate in A's name, B can recover the money from the bank, by suit, without A's endorsement on the certificate. As we have seen before, the true owner of the money has the best right to it, no matter in whose name it stands, and a note, check or other evidence of indebtedness can be transferred without being endorsed, but where a certificate is properly issued payable to A or order, if any one other than A presented the certificate to the bank without the endorsement of A thereon, or some other order of A and a surrender of the certificate, the bank would run the risk of being still liable to A if it paid without A's endorsement. The same rules are applicable to negotiable certificates of deposit as apply to other negotiable instruments.

45. If A, to whom a certificate of deposit for \$100 has been issued, endorses the certificate and then loses it, B finds it and transfers it to C, for \$100, C not knowing of B's wrongful possession, C will be a bona fide holder for value and the bank and A will be liable to C. If A proves his loss of the certificate the bank must pay what it owes to him, but it can require that A give a bond to indemnify the bank in case the certificate is presented by anyone who is a bona fide holder for value without notice. If A knows that B has found the certificate and B refuses to return it, A should sue the bank for payment and make B a party to the suit, to compel him to surrender the certificate to the bank and to pay damages

for detaining the certificate. The amount of damages would be interest at the legal rate from time demand was made until judgment is obtained and paid. If the certificate has not been endorsed by A, or is past due, or if it is in a state where such certificate is non-negotiable, B or C would acquire no right against the bank and the bank could not require a bond from A, as the bank could not be harmed. *Citizens National Bank v. Brown*, 45 Ohio State Reports, 39. If B found it and forged A's endorsement and the bank paid, it would be the bank's loss. *Honig v. Pacific Bank*, 73 California, 464. See Sec. 135.

46. When Due—In some states a certificate of deposit payable "on demand," or "on return of certificate," is treated as due as soon as issued and no demand need be made before suit can be brought, (California, Georgia, Michigan, Wisconsin and Texas), and the statute of limitations begins to run immediately upon its issue.

In some states a bona fide holder for value (one who gives value for it without knowing or having notice of any rights of others) is given a reasonable time to present the certificate at the bank for payment. If he does not present it in a reasonable time he will be presumed to have notice that the certificate, being payable on demand, is overdue. *Meador v. Dollar Savings Bank*, 56 Ga., 605. But in most states the certificate payable on demand is not due until it has been presented with demand for payment. Suit cannot be brought until demand has been made. Therefore the statute of limitations does not commence to run until demand, and where the certificate is regarded as negotiable, and has been negotiated, the same steps should be taken to protest and give notice, after demand, as in the case of a note.

47. When payable on a fixed date or, "day certain," it is

not due until that date. When due, the certificate should be presented and payment demanded, as the certificate usually states that it will be paid "on return of certificate."

48. In New York it has been held that if a certificate of deposit does not contain a promise to pay it is only a receipt. In other states it is held that a promise to repay is implied. Where the certificate complies with all the requirements of negotiable instruments, nothing outside of what is shown in the certificate can be introduced to deny the bank's liability to one to whom it has been endorsed, unless he is not a holder in good faith, for value, before maturity, but as between the bank and the one to whom the certificate is issued, the certificate, like the entries in the pass book, is only evidence of the deposit.

49. **Interest**—Where the certificate bears interest, "if left for" a certain time, the depositor is not entitled to interest if he presents the certificate and receives payment before that time has expired. Where payable on demand with interest it bears interest till paid. Where payable after a certain time and that time has expired, and the bank has not paid, the interest continues. It has been held in North Dakota that where the certificate contains the words—"No interest after that time," the bank will still be liable for interest until paid, where payment has been demanded when due and refused. This of course should be so, but where payment has not been demanded, the bank can insist upon payment when due and can reduce the rate of interest after maturity by giving proper notice. *Bank v. Harrison*, 66 Pac., 460 (N. M.).

49a. **Payment**—A certificate of deposit, if accepted by a creditor of the holder, is not payment until the certificate has been paid, unless the creditor agrees that it is to be regarded as absolute payment. It will be re-

garded as payment of a debt due the bank issuing it.

If bank A sends to bank B, for collection, a draft drawn on C, with instructions to send its draft for proceeds, and bank B receives from C, in payment of the draft, a certificate issued by it to C, this will be a payment. If bank B, after collection, sends to bank A its draft and then bank B fails, bank A will be a general creditor of bank B, on the draft. As to C, the draft will have been paid.

If bank A sends to bank B draft on C and requests bank B to collect and remit, and bank B, being insolvent, accepts a certificate of deposit from C, issued by itself, this is a fraud, and it has been held that in such case bank A would be a preferred creditor entitled to payment in full from bank B when bank B fails. Bank B should have accepted cash only and remitted it. That this was a fraud on the part of bank B is undoubted. If C was not a party to the fraud this was a payment by C. But, as no money passed to bank B, there was no trust fund created to which bank A could be entitled. There was no money to trace. If bank A traced what was given in payment for the draft, it found the certificate, which was an obligation of the bank on which the holder could be entitled to no rights superior to those of a general creditor.

50. **Loan**—While money for which a certificate of deposit has been issued is for most purposes considered as a deposit, yet, where it is not subject to being demanded or checked out at will by the depositor, but he is bound to leave it for a certain length of time, does it become a loan of money to the bank? If the depositor has the right to draw the money out when he pleases it is a deposit, notwithstanding the fact that he will lose interest if he does not leave it for a specified time. If he has no

legal right to withdraw before a stated time is it a loan? It is true every deposit is in effect a loan to the bank, but not every loan is a deposit.

There is conflict in the authorities, but it can be gathered from the decisions that the mere fact that an account draws interest does not make it a loan. If the depositor has the right to check against the account it is a deposit. See cases cited following Sec. 27. Where a certificate of deposit is payable on demand the holder has the right to the money at any time that he demands it, and where it states that the deposit has been received and is subject to "interest at —% if left for" a stated time, this does not take away the depositor's right to withdraw it at his pleasure, but cuts off any interest if he withdraws it before the time stated. When it is payable at a fixed time it is the same as the promissory note of the bank; the depositor has no control over the fund and this is a loan of money to the bank. The distinction between a loan and deposit is of importance for several reasons:

a. By some statutes public officers, and by others trustees, executors, etc., are forbidden to loan the funds in their custody. The courts of Wisconsin, South Dakota, Oregon and Nebraska have held that when a public officer deposits money in bank, even though he receives interest on the deposit, this is not a loan so long as he has the right to check out the money at will. See Sec. 27.

b. The national bank act and most of the state banking laws prohibit national and state banks, respectively, from incurring indebtedness exceeding their respective capitals, but in calculating this indebtedness the liability for deposits is not included. Any amount due to a national bank not a reserve agent, or to a state bank, private bank, savings bank or trust company, which the depositing

bank is obliged to leave for a specified time (i. e. which is not subject to payment on demand) if in excess of the capital of the bank, would be a violation of the law. As to national banks, Section 5202 of the Revised Statutes of the United States applies.

c. In some states depositors are preferred over other creditors in case of the failure of the bank. Therefore, if bank A has a balance in bank B, if the balance is a deposit it can participate with depositors before other creditors, while if it is a loan it cannot receive any dividends from the assets of the failed bank until the depositors have all been paid. Of course if a transaction is really a loan, and a certificate of deposit is issued by the borrower merely to make it appear as a deposit, this is a loan, and in states where depositors have priority over other creditors, the bank holding such a certificate would not be entitled to share with depositors. *Brown v. Sheldon State Bank*, 117 N. W., 289 (an Iowa case). And where shareholders are liable for deposits they cannot be held liable on such a transaction, which is a loan in the guise of a deposit. *State Savings Bank v. Foster*, 118 Mich., 268.

It has been held that the prohibition against a national bank loaning money on the shares of its own capital stock as security likewise prohibits the bank from depositing money permanently in another bank and taking shares of its own stock to secure the deposit. See *National Bank of South Bend v. Lanier*, 11 Wallace, (U. S.), 369.

51. Keeping the Deposit—As we have seen, a bank is indebted to the depositor for money he deposits. The money becomes the property of the bank. If stolen or lost after delivery to the bank officer, the loss falls upon the bank. Therefore the bank must employ proper

means to safeguard as its own property the moneys deposited. In consideration of the liability assumed it has the use of the money so long as the depositor leaves it with the bank. The bank's business of loaning money produces the profit which compensates it for the accommodation afforded the depositor. But while the money is its own, the law protects those who give the banks the use of their money without pecuniary compensation, by certain regulations of the banking business, by causing periodical examinations of condition of the banks, by providing a general supervision of the banks' affairs and, what concerns us mostly just now, by requiring the banks to maintain a reserve of actual cash in their vaults, to meet any contingency which might arise. This is called "Lawful Money Reserve," or "Reserve." If a bank which has loans paying high rates of interest has only a small portion of its deposits on hand in cash and a run is started on the bank, if the loans are not as liquidable as they were thought to be profitable it will mean ruin to both the bank and the depositors. Some of the reserve the banks are allowed to carry on deposit in other banks, where the law doubtless "presumes" it can be readily obtained in an emergency. I say "presumes," because during the "Bankers' Panic" in 1907 the reserves in Central Reserve Cities, especially New York, where the money was piled up, were not very "readily obtainable" by the depositing banks when they needed the "Lawful Money" and quite a few had to close their doors for lack of cash, though not actually insolvent.

52. Lawful Money Reserve of National Banks—Section 5191 of the Revised Statutes of the United States provides that every national banking association in any of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Mil-

waukee, New Orleans, New York, Philadelphia, Pittsburgh, St. Louis, San Francisco and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum (25%) of the aggregate amount of its deposits.

Every national banking association other than those in the cities mentioned must at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum (15%) of the aggregate amount of its deposits.

53. Formerly national banks were required to keep reserve against circulating notes of the bank outstanding, but this requirement was abolished by an amendment of the law in 1874. Each national bank is required to keep on deposit with the Treasurer of the United States a fund equal to 5% of circulating notes of the bank, and the amount so deposited with the Treasurer, can be counted, not exceeding 5% of circulation, as part of the 25% or 15%, respectively, which the banks must carry as reserve.

54. Section 14 of the Act of Congress of May 30, 1908, enacts that no reserve need be carried as against "deposits of public moneys by the United States in designated depositories." The banks must furnish security for the moneys of the United States thus received and as the money is deposited by the Treasury Department to place it in circulation where required to meet demands of business, to compel keeping part of it on hand in cash would defeat the object for which the money was placed in the banks.

55. **Reserve Cities**—It is convenient for all banks to have correspondents in the larger cities, to facilitate the transfer of funds and for other beneficial reasons. All national banks, therefore, keep part of their funds in

national banks in the cities heretofore mentioned. These cities are known as "Reserve Cities." See Sec. 52. Of the 15% which every national banking association is required to keep in lawful money reserve, three-fifths (9% of its deposits) may consist of balances due the bank from national banks in Reserve Cities. New York, Chicago and St. Louis are "Central Reserve Cities." Of the 25% reserve required to be kept by national banks in Reserve Cities; i. e., Albany, Baltimore, Boston, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, Philadelphia, Pittsburg, San Francisco and Washington, one-half may be kept in cash deposits in national banks in "Central Reserve Cities," New York, Chicago and St. Louis.

56. Reserve Agents—Each bank must select the bank or banks in the reserve city wherein it desires to keep its reserve and this reserve city bank, called a "Reserve Agent," must be approved by the Comptroller of the Currency. Form of making application for appointment of, or change in, a reserve agent will be furnished by the Comptroller of the Currency. All national banks in "Central Reserve Cities" must keep on hand in lawful money the full amount of 25% required to be kept by them.

57. What May be Counted as Reserve—"Clearing House Certificates, representing specie or lawful money specially deposited for the purpose (i. e. for the purpose of receiving the clearing house certificate), of any clearing house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing house, holding and owning such certificate." Sec. 5192 Revised Statutes U. S.

It has been noted that part of the "Lawful Money Reserve" may consist of balances due from reserve

agents; that clearing house certificates issued for money deposited can be counted as reserve, as can the five per cent. redemption fund with the Treasurer of the United States. Otherwise the "Lawful money reserve" must be in gold coin, gold certificates, gold certificates payable to order, legal tender notes, silver dollars, silver certificates and fractional silver coin. Nickels and cents cannot be counted, nor can national bank notes.

CHAPTER IV.

PAYMENT OF DEPOSITS.

58. Contract Existing Between Bank and Depositor.—

As has been seen, the relation of the bank to the depositor is that of debtor to creditor, and that there exists between the bank and the depositor a contract.

Unless there has been some other agreement or understanding, the contract existing between the bank and a general depositor is that the bank, having received deposits, will honor the checks or orders of the depositor on presentation, if there is a balance to his credit large enough to meet each order as presented, provided the bank has no right of lien or set-off against the amount.

Sometimes the pass book given the depositor contains the by-laws of the bank relating to the receipt of deposits and their payment, and so far as these rules or by-laws are reasonable and not contrary to law the depositor is bound by them. No secret arrangement between the depositor and the bank can be shown to establish a right to preference by one depositor over others, in case of failure of the bank. Of course, there must be an agreement, express or implied, before the relationship of bank and depositor can arise, and unless one who owns the money consents to its being deposited the relation does not exist.

59. Before there can be a binding contract of any kind there must be an agreement between two or more parties. The agreement may be presumed from the actions of the parties or it may be expressed by spoken words or by written instruments. A depositor may make an

express agreement with the bank, in which case that agreement will control the relationship. By his action in simply opening an account in bank, or depositing money to the credit of an account, we saw in the first chapter of this work, that the contract of depositor and depositee is established. It is an implied contract. The law makes the contract which the conduct of the parties shows they intend shall subsist between them. But to make an agreement, either express or implied, a binding contract the parties who make the agreement must be competent, in law, to contract. In most States now a married woman can contract the same as if she were unmarried. An infant is not competent to bind himself by a contract except for necessities, but the disability is for the benefit of the infant and the other party, if an adult, is bound, while the infant can avoid if he chooses. Where the infant is not taken advantage of, and he has received all that is due him under a transaction which has been for his benefit, the other party cannot be further held. In most of the States the law provides that deposits, when made by an infant in savings banks, can be repaid to the infant and the receipt of such infant will discharge the bank. In some States savings accounts in savings or State banks can be thus treated. Under general laws where an infant owns property he has no right to transfer or deal with that property, but a guardian must be appointed to manage his estate until he arrives at the age of 21. It is believed that where the State law provides that an infant may control his savings deposited in a savings bank, the state or national banks in such State would be safe in paying out to an infant money deposited by himself as small savings, as the banks cannot deny the right of the infant to it where the money was taken from him; but where the money has been deposited by another for the infant, or the amount

is large enough to justify the appointment of a guardian, a guardian should be appointed. A male is an infant until 21 years of age. In some States a female becomes of age, at least for some purposes, at 18.

60. An insane person is not generally capable of entering into a binding contract. The question is whether the party has sufficient mind to know the meaning of the contract he is entering into. If not he can avoid the contract. The deposit of money by a person of unsound mind, where the bank does not know that he is of unsound mind, would establish the relation of bank and depositor. If, without having notice of his condition, the bank paid money from his account on his orders, the bank would be discharged. After a bank has learned that it has the deposit of a person non compos mentis, it should not pay except upon the order of a committee or guardian appointed to take charge of the incompetent's property. If the party has been declared insane by a competent court, or a committee or guardian has been appointed, the bank is presumed to have notice of his insanity. See Sec. 179. But as the bank usually performs the functions of a depository without compensation, it will usually be discharged when it performs the duty ordinarily required of it, in paying on orders of a depositor without notice of his insanity.

61. A contract entered into by one who is under the influence of liquor is not binding upon him if he was so drunk that he did not know what he was doing. As orders by the depositor must be promptly paid by the bank when presented, and the bank oftentimes pays them to persons other than the depositor himself, it is obvious that the bank would run a great risk in paying checks of a depositor who is known to indulge too freely in intoxicants if it were held liable to pay again or credit back the amount upon a showing that the drawer of the

check was drunk when he signed the check. Of course such customers are undesirable. But where a contract is made by one who is insane or so drunk that he does not know what he is doing and is as good as insane, he can avoid the contract on his part. However, the signing of a check is not in itself the making of a contract with the bank. It is an order upon the bank pursuant to a contract already made. The bank has agreed to honor orders signed by the depositor. Therefore, where the bank does not know the circumstances under which the order was signed it should be discharged upon payment of such order. When the depositor signs and delivers a check to the bank himself the bank can at least see his condition; but where the depositor delivers the check to a third party the making of a contract is attempted between the depositor and the said third party. If the one to whom the check is delivered knows the condition of the drawer, he knows that he has no power to make a contract by delivering a check, and when he takes the check to the bank or negotiates it, he commits a fraud. Now the question is does he commit a fraud upon the depositor or upon the bank or the one to whom he negotiates the check? If drunk, the depositor has made it possible for the fraud to be committed and he should stand the loss, or if innocent, and the payee of the check has imposed upon the drawer by taking advantage of his insanity or by making him drunk, the wrong still has been done to the drawer first. His contract with the payee, who has wronged him, is voidable and he can recover (if such a thing is possible) what the payee obtains under the check; but surely, where the bank knows nothing of the circumstances attending the making of the check, it would seem that the contract which the bank entered into when it received the deposit justifies it in paying any orders the appearance or presentation of

which do not raise suspicion, where it has no other notice. *Reed v. Mattapan Deposit & Trust Co.*, 84 N. E., 469 (Mass.).

62. Where Payable—The deposit is payable on demand during business hours, at the bank, unless some other agreement has been made with reference to its payment.

63. Form of Order to Pay—If the depositor verbally orders the bank to pay, or to transfer to some other account, his deposit or any part, and the bank carries out the instruction, the bank will be discharged and the depositor will be bound. *Whitsett v. Peoples Nat. Bank of Warrensburg*, 119 S. W., 999. It is the custom, however, to require that the order for payment be in the form of a check drawn upon the bank, or that a receipt or some other written instrument be given to evidence the payment by the bank. And the bank can and should insist upon some written evidence being given. If the depositor orders the payment verbally the bank is under no obligation to the party to whom it was ordered to pay.

64. As we have noted before, while it is a general principle of law that the debtor must seek the creditor, the bank need not hunt up the depositor; its contract is to pay the deposit on demand at the bank.

As it is the universal custom of banks to pay out the depositor's money on checks, the laws relating to checks, their form, and the rights and obligations attached to them will now be considered.

CHAPTER V.

CHECKS.

65. **What is—**There has been much discussion and diversity of opinion as to whether a check is an order merely or whether it is a bill of exchange; whether it is an assignment of the depositor's funds or not, etc. The Negotiable Instruments Law, which has now become law in most of the States defines a check: "A check is a bill of exchange drawn upon a bank, payable on demand."

When A gives to B a check reading:

"A B C Bank" (Drawee)

"Washington, D. C., Feb. 1, 1910

"Pay to the order of B (Payee) (or B or order) \$1,000

One Thousand Dollars
(and charge to account of)

A (Drawer) Depositor."

This is the same as if A handed to B a writing as follows: "There is in the hands of A B C Bank one thousand dollars belonging to me, which A B C Bank will pay to you, or to any one you order A B C Bank to pay it to, upon prompt presentation of this paper, and if the bank does not so pay to you or any one to whom you endorse this check, I will pay the same." The law reads into the check substantially these words. The one to whom the check is made payable (B) can transfer it to another by simply endorsing it (i. e., writing his name upon it, usually on the back). And so it may be passed along from one to another. If the check is payable to B

or order, or to the order of B, and B endorses it by simply writing his name, this is an endorsement in blank and the check can then be transferred by the one to whom B endorsed it without any additional endorsement. And where a check is payable to "Bearer," or to "A or bearer," it can be transferred without endorsement. Where payable to bearer, or payable to order and endorsed by the payee, no further endorsement is required in law to transfer title, but the bank is not buying the check when presented for payment. It is paying the order, and the custom is to require the holder to endorse it, and the bank should require the one to whom it pays to endorse, as this is evidence in the nature of a receipt for the payment. In can not be insisted upon, however.

Where payable simply to the drawer and presented by himself no endorsement on back is necessary. The depositor's order to pay must be honored and when surrendered is evidence of payment.

66. Drawing the Check—Care should be taken in drawing a check. It should be properly dated. There should be no blank space left before or after the written statement of the amount or before or after the figures indicating the amount. The drawer should begin writing the amount at the extreme left end of the line, so that there may be no opportunity to fill in additional words. The figures should be accurately made and in such a clear manner that they cannot be easily changed. If the bank makes a mistake in paying a check, or pays a forged check, or an amount in excess of what the check was drawn for, the bank must stand the loss. But while the depositor is not called upon to insure the bank against his checks being forged or raised, he should use such care in preparing his checks as will at least not make it easy for one getting possession of the check to commit a fraud on the bank. And if the depositor is negligent

he may have to bear the loss himself. If he leaves a space which can be easily filled in to raise the amount, he will have to bear the loss occasioned by his own negligence. If he signs checks in blank and leaves them with an agent, through whose negligence a blank signed check is stolen and filled in, or if through his own negligence someone gets hold of the check, and fills it in and passes it to an innocent person who gives value for it without notice, the depositor must stand the loss for which his negligence is responsible.

67. Date—The check should be dated. If not dated, any holder can fill in the date. If dated on Sunday the check will not be invalid, but a check cannot be delivered or paid on Sunday without the risk of its being declared invalid. The date of delivery is the date on which any contract takes effect. Where the date on which any act is to be done under a negotiable instrument falls on Sunday or a legal holiday, in most States the act may be done on the next succeeding secular or business day. In some States the day before is designated, and in some States Saturday or part of Saturday is a holiday.

68. Change of Date—Where the check is properly dated and any holder changes the date without the consent of all parties on the check it would seem that the check would be void under the Negotiable Instruments Law, which provides that "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent endorsers." "Any alteration which changes: 1. The date; * * * is a material alteration." "But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

69. Post Dated—Where a post-dated check is changed in date the depositor cannot be held liable thereon and if the bank pays before its original date it will have to stand the loss, but can recover from the one it paid it to. Otherwise, where the date is changed, the depositor will be liable to a bona fide holder to the same extent that he could be held if the date had not been changed. See Sec. 98.

69a. A contract made on a holiday is valid. The holiday suspends performance of some acts. See Sec. 67.

70. Form—The blanks provided by the bank should be used whenever possible, but a check on one bank, written upon the blank form of another bank, with the name of the bank changed, is valid, and where one bank pays such a check the bank on which it is drawn cannot charge the paying bank with negligence.

There is no particular form required by law. Any sufficient demand upon the bank would make the bank liable to the depositor, but where a check is used and is intended to pass as money in a transaction between the depositor and parties other than the bank, the essentials necessary to make it a negotiable check must be present.

71. There must be an unconditional order upon the bank, to pay a sum certain, in money, upon demand, to a specified person or his order, or to such person or bearer, or to bearer. If no person is named to whom it is payable, it is not a check. But where the name of a fictitious person or a name of an account, or a number, as "Cash," "No. 583," etc., is designated as payee, such check is payable to bearer.

If the check is payable at a future date, i. e., at a later date than the date of issue, and not on demand, it is a bill of exchange, and where the Negotiable Instruments Law is not in force a bill of exchange is entitled to grace, and the holder can present for acceptance, and protest if

not accepted, whereas a holder of a check can present for payment only on the due date, without grace, and not for acceptance.

72. The number on a check, memoranda as to what the payment is for, etc., are simply for the benefit or information of the drawer, and to the bank are the same as if they were not present on the instrument. "December taxes." "For rent," "B. P. No. 2," etc., are phrases which the bank need pay no attention to. All the bank looks to is the date, amount, order to pay, the signatures and the identity of the person presenting the check. Care must of course be exercised in identifying the one to whom money is paid on a check. In order that the holder may be identified there must be a specified person.

73. **Writing in Body of Check**—The fact that the handwriting in the body of the check is not the writing of the depositor whose signature the check bears, is not in itself notice that the check is wrongfully drawn. It may be written, stamped, typewritten or printed. Of course, it might be, in some instances, enough to give the bank warning of something being wrong. A bank cannot refuse to honor checks rightfully drawn, and at the same time is liable if it pays a check which is forged or raised, so that the bank must bear the responsibility of deciding in each particular case whether there is sufficient irregularity to warrant dishonoring a check and taking the consequences of refusing to pay if the check is valid.

74. The Negotiable Instruments Law provides that where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount. When there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

75. Amount of Checks—One of the general principles of equity is that if A owes B, B cannot split up his right against A and assign different parts of it to C, D, and E, etc. And partly on this principle is based the theory that a check for only a part of the fund is not an assignment of the fund, but that it belongs to the depositor until the bank has actually paid the check. In banking business, however, the custom of paying and the right to demand payment of checks in any amount has become so well established that the rule mentioned does not apply to a deposit in bank; and unless there is an agreement to the contrary with the bank, the depositor can draw checks against his account (so long as he has the funds in bank) in such amounts as he sees fit. He cannot, however, draw innumerable small checks merely for the purpose of annoying the bank, or, where checks give the holder the right to sue, give many small checks simply to vex the bank with many suits.

76. By an act of Congress of March 4, 1909, the criminal laws of the United States were codified. Section 179 of that act reads as follows:

"No person shall make, issue, circulate, or pay out any note, check, memorandum, token or other obligation for a less sum than one dollar, intended to circulate as money or to be received or used in lieu of lawful money of the United States; and every person so offending shall be fined not more than five hundred dollars or imprisoned not more than six months, or both, at the discretion of the court."

This is not a new law, but its codification without any explanation has raised a doubt in the minds of many whether a check for less than one dollar can be given. The law was passed in 1862, being a part of the act of July 17, 1862, and afterwards became Section 3583 of the Revised Statutes of the United States and, together with

the other sections of the Revised Statutes relating to legal tender and money, provides a punishment for the issuing of any paper *to circulate as money* where there is no authority of law for its issue. Where A gives B a check in payment of a debt, it is true that in a sense it takes the place of money, but A does not **intend** that the check shall circulate in the hands of any holder as money. He intends, primarily, that B shall present the check at the bank and obtain the money.

Some of the States provide by statute that no paper shall be issued to "circulate as money," other than lawful money of the United States and bank notes, where authorized, and some likewise prohibit the issue of checks for less than one dollar "to circulate as money."

77. Signature—Having been carefully drawn, the check must be signed by the depositor in the name under which he has deposited the money, or under which the bank has agreed to pay out the money. A signature in pencil is valid. A printed signature or a rubber stamp impression of a signature is valid, where it has been agreed that such signature is to be used. But where a party brings suit on a check so signed he must show that the stamp or printed signature has been adopted. Where a stamp is used, care should be taken to avoid its improper use by another. If through the depositor's negligence the stamp is wrongfully used on a check, the depositor will have to stand the loss. If the depositor cannot write, he must have someone else write his name for him, make a mark "x," and have witnesses to his having made the mark as an acknowledgment of the signature as his. Some one should be authorized to sign for him. See Sec. 79.

78. Corporation—Where a check is drawn by a corporation, the bank should require evidence of authority

of those who sign for the company, and having agreed upon the signature to be honored, should pay no checks unless so signed. Only such officers of a corporation can sign as are given authority by the charter or by-laws of the corporation. A corporation can only act through its officers and agents, and such officers or agents can bind the corporation only so far as they have authority. But where a corporation holds out an officer as having authority, the corporation will be bound where by the exercise of such authority the corporation has received benefits. So a corporation will be bound by the acts of its officer where upon his signature to checks the corporation receives the deposit. The proper signature is the name of the company, followed by the name of the officer and his title, but where the name of the company appears elsewhere in the check the same need not appear again in the signature, and frequently does not; and the signature is presumed to be the signature of the company.

79. **Power of Attorney**—Where one person has been authorized to draw checks on another's account, checks so drawn can be paid by the bank so long as it has no notice that the agency has been revoked or the authority withdrawn. It must not pay a check drawn after expiration of the time for which the authority was granted, nor after the revocation of authority, where it has notice. If a check has been drawn after revocation, but before the bank has notice, the party for whom the agent had been acting and against whose account the check was drawn cannot hold the bank liable unless he can show that the one to whom the bank paid the money was not a bona fide holder for value.

80. The mere fact that an agent has authority to deposit money for his principal does not in itself empower him to withdraw the money or sign checks. *Bank v. Gibboney*, (Ind.) 87 N. E., 1064.

A written power of attorney from the principal to the agent should be filed with the bank.

81. Partnership Funds.—Where a partnership deposits its money, each partner has authority to sign the partnership name. Each partner is agent for all. But no one can use the partnership money to pay a private debt, and the account should be in the name of the partnership, and checks so signed. The bank should not pay on the individual signature of one partner. If it does, and the money is not used for partnership purposes, the bank will be liable.

82. When one partner dies, his death, in most States, dissolves the partnership, and the survivor, or survivors, become vested with title to the assets for the purpose of winding up the affairs of the partnership. In such case the survivor can draw out the money in his own name.

83. Joint Deposits.—Where money is the joint fund of persons not partners in trade, generally each one must sign checks or orders withdrawing the fund, though there may be an agreement between the parties and the bank, that checks are to be signed by one, in which case checks so signed must be honored.

84. When a deposit is made by husband and wife, payable to both or either, checks signed by either one alone or by both must be honored, but the question as to whose money it is depends upon all the facts.

85. On the death of one of several persons in whose names the deposit is made, the question as to what disposition the bank should make of the money depends upon all the facts and circumstances. In one case where a certificate of deposit was issued in the name of A and B, his wife, and payable to A and B or A or B, on the death of A it was held by a Maryland court that B was only the agent of A, and A's death revoked her authority to draw the money. If the money was actually the

joint property of all, the death of one would leave the title in the survivor or survivors. If the property of one, but deposited merely with the understanding that others could draw it out, of course, then the death of the owner would revoke the right of the others to draw. All the facts and circumstances must be considered. If the one who deposits it has full control over the money during his life, his death will revoke authority given to others to check against it; but where all control and jointly own the fund, the survivors are entitled to it. In any event, if there is an agreement between the parties and the bank, the agreement controls. If the bank, on the death of one, pays the money to the wrong person, it will be liable to the rightful owner. See sec. 177. When such deposits are made the bank should have an understanding with all parties interested, as to the ownership of the money, not merely the right to withdraw. Where parties agree the agreement will control.

86. When more than one executor or administrator is appointed, usually the act of one binds all; and so if one draws a check the bank will be discharged if it pays the check. *De Haven v. Williams*, 89 Pa. St., 480.

87. The law relating to trustees, however, is different; all must join in making contracts, and so all must sign checks.

87a. **Signature File.**—The bank should keep a proper file of its customers' signatures. It is bound to pay checks when properly signed; but as the bank pays checks at its peril, the individual, corporate and partnership names and authorized signatures should be well known to the officers who pay the checks.

88. **Delivery.**—A check is not binding upon the maker, or drawer, until he has delivered it to the payee or the payee's agent, or at least parted with it with the intention that the payee should become entitled thereto. So,

when the payee endorses it, the transfer to the endorsee is not complete until delivery. However, where a check has been signed, or endorsed, but not delivered, if it is stolen and comes into the hands of a bona fide holder for value, without notice, the maker or endorser will be liable to such holder in good faith, for value, without notice. *Voss v. Chamberlain* (Iowa), 117 N. W., 269. And in such case a payment to the bona fide holder would release the bank. But if forged, no one could acquire any right against the one whose name was forged.

88a. Endorsements.—We have seen that a check payable to bearer, or payable to order and endorsed in blank, is negotiable by delivery. See Sec. 65.

If the holder desires, to prevent further negotiation, except by B, he may endorse it "Pay to B or order," and sign his name "Holder," or "Pay to the order of B, Holder." This is a special endorsement. The check is now payable to B only; until B has endorsed it no one can get title to it as to B. B, however, takes absolute title and can further negotiate it, by endorsing as he sees fit.

If the holder, say A, received the check endorsed in blank, i. e., by the payee merely having written his name on back, A, if he wishes to prevent negotiation of the check, can write over the blank endorsement "Pay to A or order," when the check, as stated in the preceding paragraph, cannot be negotiated until A has endorsed it.

If the holder (A) desires to endorse it to another merely to collect for him, or to give the transferee title only for a special purpose, he can endorse it "Pay to B Bank, for collection," "Pay to B only," "A, for Deposit only," etc., signing his name, in which cases the endorsement would be restrictive. The one to whom endorsed, B, would take title only for the purpose of collection, or for use as may be stated in the endorsement. He would have no right to negotiate the instrument, but to collect

or use it for the special purpose only, and anyone who took it from B would have notice that the proceeds belonged to A, and would take no better title to it than B himself had. If endorsed to the "order" of the endorsee, though restrictive, he obtains full title and a bona fide holder would take title by endorsement from B.

88b. Whether the holder transfers a negotiable instrument by endorsement or by delivery, he warrants *to the one he transfers to*. "That the instrument is genuine and in all respects what it purports to be; that he has good title to it; that all prior parties had capacity to contract; and that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless."

When he endorses, however, he also warrants *to all subsequent holders in due course*, that the instrument is at the time of his endorsement valid and subsisting and that it will be accepted or paid, or both, on due presentment, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent endorser who may be compelled to pay it. The "necessary proceedings on dishonor" are protest, and notice of dishonor. A local check need not be protested, but where there are endorsers it is better to protest. See Sec. 89 et seq.

Where a check is drawn in one state on a bank in another state, it is a foreign bill of exchange, and should be protested. Where protested, the protest should be made on the day of dishonor at the place where it is dishonored. We have seen that a check is usually presented for payment and not for acceptance; and that the endorser does not warrant to the bank on which drawn the signature of the drawer. See Sec. 141.

88c. **Without Recourse.**—Where any holder wishes to

transfer title, but avoid liability if the drawee or a prior endorser does not pay, he can do so by endorsing "without recourse," and signing his name. Such an endorsement is called a qualified endorsement. It passes title to the instrument and the endorser makes the same warranties as stated in Sec. 88b, but *to the person to whom he transfers only*. He does not agree to pay if the drawer or maker does not pay; and he does not become in any way liable to anybody but his immediate transferee.

88d. Signature.—The signature in an endorsement must correspond exactly with the name on the face of the check. If the name is misspelled, the endorsement can be written first as appears on the face and then in the proper name of the endorser.

88e. Bank.—When a bank becomes the holder of a check drawn on another bank, by cashing or giving credit for same, or by transfer by delivery or endorsement from the holder, the bank becomes entitled to the same rights and assumes the same liabilities as any other endorsee or transferee. It does not guaranty the signature of the maker of the check, by paying. The guaranty of depositor's signature is only by bank on which check is drawn.

89. Presentment.—When A gives a check to B, A is not discharged until the check is paid, unless there is a distinct understanding that the check shall be payment. See Sec. 154. Otherwise, if a worthless check were given, the original debt could not be sued on and the debtor would escape payment. However, when A gives a check, it must be presented at the bank, during banking hours, within a reasonable time. If it is not, and any loss arises which either A or the holder must bear, the burden of the loss will fall upon the holder. A would have no right to draw a check if he had not sufficient funds in bank to meet it,

and no right to draw out all his funds to prevent the holder from collecting the check, no matter how long it might be outstanding. But if the bank should fail, and the facts be such that the check, drawn in good faith, would have been paid if there had been no delay, the one who delayed must bear the loss. A should not be held to bear a loss which would not have occurred if the check had been presented in a reasonable time.

90. If the payee lives at the place where the bank on which the check is drawn is located, the check should be presented on the same day it is received or on the day following the day of its receipt. If the payee is at a different place he must send it, the same day or the day following the day of its receipt, for presentment, in a reasonably direct way. If the one who takes the check knows that the bank on which it is drawn is in a failing condition, he should immediately make presentment, to save any loss to the drawer, the endorser, and possibly to himself. If the check is presented through a clearing house, generally another day is given to make presentment, to bind endorsers.

91. If presentation is delayed beyond the time mentioned and a loss is incurred, as by the bank's failing, the holder of the check must stand any actual loss as between holder and drawer. As between holder and a prior party, the one at fault must suffer the loss. If the maker had no funds in the bank when the check was drawn, or drew the money out before the check was presented, this would not be a loss, but if intentional might be a fraud.

92. The Negotiable Instruments Law provides that a check must be presented for payment "within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." When A gives a check he has the right to have it presented for payment. And the fact that the check is

endorsed by the payee and negotiated, does not extend the time within which it much be presented as against the drawer, *A. Dehoust v. Lewis*, 112 N. Y. S., 559. As stated above, the rule adopted in most states is that the check must be presented not later than the close of business on the day following the day of its receipt by the payee or holder. If the party receiving it is not in the same place where the bank is located, he must forward it, before the end of the day following the day of its receipt, in a reasonably direct way, for presentment.

However, the payee may negotiate the check, by endorsement, or otherwise transfer his rights therein. Where he does it by endorsement, in order to bind the endorser the holder must present it within the same reasonable time after he receives it (the same day or the day following), and the Negotiable Instruments Law provides that when an instrument has been negotiated it must be presented "within a reasonable time after the last negotiation thereof," to bind endorser. So that under this law, if the payee endorses the check to C, C endorses it to D, etc., the last one to whom it is endorsed has until the close of business on the day following the day of its receipt by him, to present or forward it for presentation. *Columbian Banking Co. v. Bowen* (Wis.), 114 N. W., 451; *Plover Sav. Bk. v. Moodie*, 110 N. W., 29 (Iowa). If it is not presented then, the endorser is absolutely discharged in some states (*Aebi v. Bank of Evansville*, 124 Wis., 73), while in other states they are discharged only to the extent that the delay in presentation has caused a loss which would not have been suffered if the instrument had been promptly presented (*Small v. Franklin Mining Co.*, 99 Mass., 277).

93. Where Drawer Has Lost Nothing.—Where the drawer has lost nothing or suffered no injury by reason of the delay, he is liable on the check no matter how long presentation may have been delayed; but if, after a long

delay, the check is presented and not paid, the claim on the original debt may be barred, though the check itself might not be.

93a. Delay in making presentment is excused when caused by circumstances "beyond the control of the holder and not imputable to his default, misconduct or negligence."

93b. If the maker has no funds in the bank when he gives the check, or if he directs the bank not to pay, no presentment need be made; and where the check was given the payee for his accommodation and he has endorsed it, no presentment need be made to bind him as an endorser, as "he has no reason to expect that the instrument will be paid if presented."

93c. To be on the safe side, prompt presentment should always be made by every holder of a check, unless a prompt negotiation thereof is made.

94. **Notice.**—Presentation having been properly made, if payment is refused the holder must notify the drawer and endorsers. Notice should be given the same day or the day following the day of dishonor. A check need not be protested, but it is customary to protest nevertheless, as in proving presentation and dishonor the notary's certificate of protest furnishes prima facie evidence. No protest is required where the payee himself presents the check at the bank and payment is refused, as prompt presentment for payment is all that need be made to protect the payee against the maker. But he should be notified, in order that he may protect himself if the bank has made a mistake. *Cassel v. Regierer*, 114 N. Y. S., 601. See Sec. 88b.

95. The payee of a check, or the holder thereof, should not mail it direct to the drawee bank for payment. If presentation cannot be made at the bank, it should be sent to some other bank for presentation. A negotiable instrument should not be surrendered until paid, and sending direct to the drawee is generally held to be negligence. R.

H. Herron Co. v. Mawby, 89 Pac., 872 (Cal.); Winchester Milling Co. v. Bank of Winchester (Tenn.), 111 S. W., 248.

96. **Stale Checks.**—When a check is presented at a bank or offered by a payee or holder to a creditor long after its issue, the bank or the creditor must determine whether there are sufficient circumstances to warrant an inquiry from the maker as to whether the check is still good, before paying or accepting same; for, if the check is stale, and the drawer has equities which he can set up as a defense to the check, the bank might not be allowed to charge the payment to the depositor, or the one who takes it might be unable to recover on it from the maker. A few days would not be sufficient to give notice of any equities. Whether the bank has been negligent in paying a stale check, or whether it has been justified in refusing to pay a check long outstanding is a question of fact for the jury. This is another case where the bank is between two fires. The bank is bound to pay all valid orders and must stand the loss if it pays one wrongfully. It has been held that a check six months old was not sufficiently old to warrant a bank's refusal to pay. The account of the depositor as of the date the check was given and at the time the check is presented should be examined; and, of course, if there is not sufficient to the credit of the maker, the bank assumes the risk in paying such a check, for if the drawer has discharged the debt for which the check was given, the bank could not recover for payment made.

97. As between the maker of the check and one who becomes holder, the holder assumes the risk in accepting a check when it is stale. All the circumstances must be considered in determining whether it is stale. In one case twenty-six days has been held to make it stale. At least four or five days usually would not be deemed an unreasonable time to give a check to circulate to the drawee bank.

Lancaster Bank v. Woodward, 18 Pa., 357; First N. B. v. Needham, 29 Iowa, 249.

98. **Post Dated Checks.**—Ordinarily a check is presumed to be drawn against funds which the depositor has in bank. If he issues a check when he knows he has no funds to meet it at the time, he may do it either because he has an arrangement with the bank allowing him to overdraw, or he commits a wrong. See Sec. 195. He is not guilty of a wrong, however, when he issues a post-dated check (a check dated ahead). It is not presumed that he has funds in bank to meet such check when drawn, but that he will have funds there to meet it when it is presented in the ordinary course of business at the time of its date. Before that time he has the right to draw other checks against his deposit. Even though the bank knows of the post-dated check outstanding, it cannot refuse to pay proper checks on demand. The bank cannot pay or certify a post-dated check before the day of its date. *Clark N. B. v. Albion N. B.*, 52 Barb. (N. Y.), 592. If it does, it cannot charge the amount to the depositor if he countermands or stops payment before the day of its date.

99. **Countermanding or Stopping Payment.**—It is the law in nearly all the states that the depositor has the right to countermand checks, or stop payment. The bank must pay only on the order of the depositor, but must pay every valid order presented so long as unincumbered funds are to the credit of the depositor. If a dispute arise between the depositor and one to whom he has given a check, these two must settle their dispute themselves and the bank should not be dragged into their difficulty, and, therefore, the bank is not concerned as to how many checks are outstanding, but only as to the validity of the check as it is presented, unrevoked, and the state of the depositor's account. Where payment is stopped on a check the bank must not pay such check or it will be liable to the depositor. *Elder v. Bank*,

55 N. Y. S., 576. Of course, where the bank has certified a check it is presumed that the depositor has been charged with the amount, and on such a check the bank is liable itself to the holder. It cannot be countermanded. But see Sec. 131b.

100. In Illinois it has been held that a check cannot be countermanded, on the ground that it is a fraud for the depositor, after issuing a check, to withdraw the money so that there will not be sufficient to meet the check, and that it is likewise a fraud to tell the bank not to pay. But suppose the bank does not know of an outstanding check and the depositor himself demands payment of his entire balance? The bank cannot refuse to pay him. In Illinois it was the rule that where A drew a check to B, B could sue the bank, as the check was regarded as an assignment of the fund to the one to whom the check was given. This has been changed by the Negotiable Instruments Law and, as was the rule in most states before, and is the rule now where the Negotiable Instruments Law is in force, a check is not an assignment of the fund, and the money in bank belongs to the depositor until the bank has paid it out on his orders. The bank owes no duty, and is under no legal obligation, to the holder of the check, unless the bank has certified it. If the depositor has the check certified he can countermand it before he delivers the check, but if he has delivered it, or if the bank certifies it at the request of the holder, it cannot be countermanded, as the bank has promised to pay—it is now the obligation of the bank. But see Sec. 131b.

100a. A cashier's check cannot be countermanded. *Drinkall v. Movius State Bank*, 11 N. D., 10; 88 N. W., 724.

101. **Revocation by Death.**—It is generally held that the death of the depositor revokes checks drawn by him and delivered but not paid. On the death of the depositor

the money in bank passes to his executor or administrator at the instant of his death, for distributon under the law of the state where he is domiciled, subject to the rights of creditors. If the bank knows of his death it will certainly be liable to the estate if it pays a check thereafter, unless it has, by certifying, become debtor to the holder and not to the depositor; and it has been held in most cases that the death of the drawer revokes all unaccepted checks. If the money in bank is the depositor's money until the bank has actually paid it out, and the death of the depositor itself passes the title of his property to his representative, it follows that the effect must be the same on the deposit as on any other personal property. See Secs. 177, 178.

Where the check operates as an assignment, the money represented passes at the time of the assignment and is no longer the depositor's; but checks are generally not regarded as asisgnments now. In some states a certain time after death of drawer is given in which to present checks. Natl. Com. Bk. v. Miller & Co., 77 Alabama, 168.

102. Revocation by Insolvency.—Insolvency of the drawer revokes all checks not paid, in those states where a check is not regarded as an assignment, and also under the United States Bankruptcy Law. Bowker v. Haight & Freeze Co., 146 Fed., 257, and see 146 Fed., 761.

CHAPTER VI.

PAYMENT OF CHECKS.

103. **Payment When Presented.**—A bank must pay the checks in the order in which they are presented, regardless of the dates. If A, having \$100 in bank, gives B a check for \$100 on the 1st of the month, and on the 2d A goes to the bank and presents his check for the \$100, even though the bank knows of the outstanding check in B's hands, it must pay to A, except where a check operates as an assignment. *Bank v. Ingersoll*, 2 Neb., 617; *Dykers v. Bank*, 11 Paige (N. Y.), 612.

104. No matter how many hands a check passes through, the bank must pay it.

105. When the check is presented at the bank and the money is passed over the counter, to one other than the maker (or depositor who drew it) and accepted by him, the holder is absolute owner of the money. If the bank afterwards finds the depositor's balance was not large enough to meet it, and cannot recover from the maker on the overdraft, it is the bank's loss, unless there is fraud or collusion on the part of the payee, or holder, as where he presents a check when he knows that the drawer has no funds. *Bank v. Burns*, 68 Ala., 600. Where payment is made and accepted in good faith the money becomes the property of the payee or holder. *Bank v. Berrall*, 70 N. J. Law, 757, where check was paid after revocation. See Sec. 113. It could not be attached as the depositor's.

106. If a check is presented for more than the depositor has to his credit the bank is not bound to pay what it has,

but if it does it should indorse on the check the amount paid, if check is not surrendered. See Sec. 137.

107. The fact that the bank has previously allowed overdrafts will not obligate it to pay a check in full when the drawer has not sufficient funds. If several checks are presented at the same time, as through a clearing house, and there are sufficient funds to pay one but not all, in some places it is the custom to refuse all, and upon a second presentation pay the first presented; in others the custom is to pay the first in date; and in still others to pay the smaller ones, though the bank is not bound to pay any when they aggregate more than the balance to the credit of the depositor.

108. If a check is presented and payment refused for lack of sufficient funds, the bank may in most jurisdictions disregard the check, and can treat funds deposited or checks presented afterwards without reference to the order refused. *Gilliam v. Merchants Nat. Bank*, 70 Ill. App, 592.

109. The only duty the bank owes is to pay, upon presentation, all checks properly drawn against an unencumbered balance. It need do nothing else. So it is not bound to certify, or to promise that it will keep out funds when received. It need not answer questions regarding the depositor's account. Though it has been held in Kansas that the bank can be made to disclose the state of the depositor's account, this was in a case where the disclosure was to the grand jury in considering an indictment. Of course, if a bank does accept a check, or certifies, or promises to do something beyond merely making immediate payment, it may become bound, but it is not otherwise under obligations to do more than pay it.

110. A payment in forged or counterfeit paper or money would be no payment at all; payment must be in legal tender, in the absence of any special contract between the depositor and the bank. See Sec. 203.

111. If a bank pays a check by issuing its own draft, which is not paid, this is no payment of the check, unless expressly accepted as payment.

112. Generally when a bank receives as a deposit by A a check drawn on itself by B, and credits the depositor (A) with the amount, this is payment of the check, the same as if the money had been handed out and immediately deposited again by the one to whom paid (A). *Bryan v. First N. B.*, 205 Pa., 7; *Consolidated N. B. v. First N. B.*, 114 N. Y. S., 308. It certainly is payment where the drawer's account is charged and the depositor's account credited, and in some states, charging it to the drawer operates as payment. *O. A. Smith Co. v. Mitchell (Ga.)*, 45 S. E., 47.

113. **Mistake.**—It is a general principle of law that money paid out under a mistake of fact can be recovered. But a bank knows, or can ascertain, the state of a depositor's account, and if it pays out, on his check, more than he has to his credit, it cannot recover from the bona fide holder to whom it has paid. *Mfrs. Bank v. Swift*, 70 Md., 575. While it may recover from the depositor whose account it has allowed to become overdrawn, this recourse will not be allowed it where the mistake was the bank's, and no fault or neglect of the depositor, if the depositor by being held would suffer a loss which he would not have sustained if the bank had not made the mistake. Of course, if any fraud or concealment on the part of any one could be shown, the payee, the bank, or the depositor, as the case might be, could enforce a correction of the mistake.

In some states it is held that the money can be recovered in any case where the bank was not required to pay and the payee has not altered his position. *Northampton N. B. v. Smith*, 169 Mass., 281.

114. If a bank by mistake credits as a deposit an item taken only for collection, or by the error of a correspondent bank, or of one of its clerks, credits as paid an item not

actually paid, such a mistake can be corrected if the depositor would not be placed in a worse position than if the mistake had not been made.

115. We have noted before that a bank should not pay a post-dated check until the day of its date. Sec. 98.

116. The check must be paid to the rightful owner, otherwise the bank may suffer the loss, whether it can recover from the one who received the money or not. Where the depositor has been negligent and a bona fide holder has received the money, the depositor must stand the loss.

A bank can not intentionally allow an overdraft, or falsely certify a check, and then claim it was a mistake.

117. It has been held that when payment is made, it will not be presumed that such payment was a mistake, but rather that the bank meant to pay it on the credit of the maker. If the bank paid it trusting that he would make his account good, it was not a mistake at all. *Whiting v. City Bank*, 77 N. Y., at 367.

It has been held in Pennsylvania that where money is paid under a bona fide forgetfulness of facts, it can be recovered even though the facts were in the knowledge of the bank, as where it could satisfy itself as to the depositor's account before it paid a note made by him. *Meredith v. Haines*, 14 Pa. Weekly Notes, 364.

Whether there has actually been a mistake must in most cases be a question of fact for the jury. Where the facts are known, a payment made under a mistake of law cannot be recovered, as where a bank pays money to A, an executor, thinking A is entitled to it, when legally it belongs to someone else. In such case if it pays to A, and A believes he is entitled to it and has altered his position, as by paying the money to the creditors of the estate, it cannot be recovered back from A, though by reason of its mistake the bank may be liable to the true owner also. If an actual mistake is made, not involving any negligence of the bank, or any

omission to inform itself when it is in a better position to learn the facts than the other party, the mistake can be corrected. And it has been held that even where the bank is negligent, if the payee was negligent equally with the bank, or more so, the bank can recover. All the facts of each particular case must be considered. The bank must pay to the right person. If it pays the wrong one it can recover back from one who has committed a fraud or forgery, if there is anything to recover, but not from an innocent holder who has changed his position by having had a check honored; and it will always be still liable to the depositor if he has not by his own fault brought about a mistaken or wrongful payment.

CERTIFICATION.

118. Purpose of Certification.—If A owes B a debt, B is entitled to receive in payment of his debt money. He need not accept a check. But the check is such convenient medium of payment that it would be considered a hardship if all payments had to be made in money, and the confidence which one man has in another induces the acceptance of a check as payment in most transactions. Sometimes, however, the party who takes the check desires to be certain as to whether the drawer has funds in the bank, and requests the drawer to have the check certified. Or it may be that, having received a check, he desires to use it as cash, and to make it pass more readily as money, he himself has it certified by the bank on which it is drawn. Certification is the acceptance, by the bank, of the check.

119. Must Be in Writing.—The Negotiable Instruments Law provides that an acceptance must be in writing, and when it is in a separate writing no liability arises in favor of anyone except those to whom the acceptance is shown, and who, on the faith thereof, receive the check or bill for value.

And in States where the Negotiable Instruments Law has not been enacted there are usually statutes which provide that the acceptance shall be in writing. Otherwise it may be verbally made.

120. Generally certification is merely the marking, stamping, or writing on the check "Good," or "Certified," or any words indicating that it is "certified as good," and the signature of the bank, by the officer certifying.

121. **Who May Certify.**—The power to certify will be in such officer or officers as the directors appoint for that purpose, but when a check is certified by any officer of a bank whom the customers have a right to believe has the power to certify, the bank will be bound.

If customers deal with the president, cashier, or paying teller, and any one of these officers certifies, and the party procuring the certification knows of no limitation on the power of the officer, the bank will be liable. In Massachusetts, in an early case, it was held that the teller of a bank had no authority to certify simply because he was a teller, even though it had been the custom for Massachusetts bank tellers to certify. It is generally regarded as a power inherent in the cashier, and as the paying teller has charge of the payment of checks, it would doubtless bind the bank were he to certify, in the absence of proof that the party procuring certification knew of his lack of power. Generally the paying teller has such authority.

122. **What Checks.**—Only such checks can be certified as are drawn in the ordinary course of business. A post-dated check, or a check drawn simply for the one named as payee to hold as collateral, could not render the bank liable by the unauthorized certification of the cashier. But a check bearing no notice of being irregular, when certified, becomes the obligation of the bank to the holder.

123. An officer of the bank cannot certify his own check, unless he has been given authority to do so, and one who

takes such a check would do well to inquire as to his authority; for if the certification is false the bank cannot be bound by such unauthorized act. Of course, if the officer's acts in so certifying are ratified, or not objected to by the directors when they know he is exceeding his authority, their acquiescence will make the bank liable when the question is whether the bank or an innocent holder, who had reason to believe the officer had such authority, should suffer. An officer of a bank should not certify the check of another officer on his bank.

124. Effect of Certification.—The certification is equivalent to the bank's saying that the signature of the drawer is genuine; that the drawer has on deposit funds sufficient to meet the check; that the amount of the check has been set apart by the bank and that this fund will be used to satisfy the check whenever it is presented. *Bank v. Baird*, 160 Fed., 642.

125. Certification Procured by Drawer.—When a depositor draws a check and has it certified by the bank before he delivers it, the depositor and the bank are liable on the check, but the depositor is liable only to the same extent as on an ordinary check. The effect is the additional liability of the bank on the check. A case decided by the Supreme Court of the United States contains a statement to the effect that whether the certification is procured by the maker, before delivery, or by the holder, is "of no importance." *First Nat. Bank v. Whitman*, 94 U. S., 343. Whether merely of no importance to the case under consideration or whether the court meant to say that as a general rule it is of no importance, is not clear, but as this point was not really before the court for decision, this statement was only dictum. The New York court has followed this case in one of its later decisions, but there also the question was not itself involved and the distinction not referred to. It would seem that unless the holder requested

the certification, he ought not to be bound to a release of the maker just because the maker has requested the certification to add to the credit which will be given on the check. If the bank fails before the check can be duly presented, the holder in such case has less recourse than he would have if the check had not been certified; for in the latter event the check not being payment until actually paid, the holder could go against the drawer. Should he be deprived of this right simply because the maker has procured a certification which was more for his benefit than that of the holder?

126. Certification Procured by Holder.—The Negotiable Instruments Law now provides that where a check has been delivered by the depositor, and its certification is afterward procured by the holder, the drawer and endorsers then on the check are released from all liability and the bank becomes debtor for the amount to any holder in due course, on the theory, if not in consequence of the actual fact, of the bank's having set aside from the depositor's funds the amount of the check, for the holder. The depositor's right is to have the check presented for payment and not for acceptance or certification. Usually the amount is charged to the depositor and credited to a "Certified Check Account," or in some other way carried in a separate account on the books.

127. Bank Debtor for Amount.—As between the holder of the certified check and the bank, the bank is liable to him as to an ordinary depositor. It is debtor for the amount. *People v. St. Nicholas Bank*, 58 N. Y. St., 712. And it is liable on its certification whether the transfer has actually been made on the books or not. The holder is not concerned with the bookkeeping of the bank.

128. Statute of Limitations.—The statute of limitations is generally held not to run against the amount until

the payment of the certified check is refused by the bank. *Bank v. Bank*, 39 Penn. State, 92.

129. Certifying.—Care should be exercised by the bank in certifying checks. If a mistake is made and a check certified for more than the depositor has to his credit, while the mistake can be corrected if no one has been injured, the bank will be liable to an innocent holder; and so if it certifies a forged check it will have to answer to an innocent holder. *Adam v. Mfrs. & Tr. Nat. Bank*, 116 N. Y. S., 595. When it certifies it guarantees the genuineness of the drawer's signature but not endorsements. Even though an officer falsely certify a check the bank will be liable. But where a national bank promises that it will pay all checks presented, regardless of the date or amount, this is a guaranty of the debt of a third party, which a national bank has no power to make, and which, therefore, cannot bind the bank, as the one to whom the promise was made must know that the bank has not the power.

130. Raised Checks.—If a check is raised after it has been certified, the bank will not be liable to a bona fide holder for more than the amount certified, and if it pays the excess it can recover it, provided an innocent party to whom it paid has not been placed in a position, by its payment, which would impose a loss upon him which he would not have incurred had payment been refused when demanded. The bank does not guarantee, when it certifies, that the writing in the body of the check is genuine. And when a bank certifies a check the amount of which has been raised since the check was made, but before certification, the bank, if not negligent, should not be held liable to the holder; and if it pays on the instrument, should be allowed to recover the amount in excess of the original sum. Of course, if the bank is negligent, it must answer to the holder, and cannot recover if the mistaken payment is due to its own fault. Where payment of a raised certified check has been made

by another bank and paid to that bank by the certifying bank, the certifying bank, upon discovering that the check has been raised, can proceed for a return of the money paid, either against the bank which paid it or the holder who received the money. Before bringing an action the bank should tender the instrument and demand a return of the money. See Sec. 138.

131. Promise to Accept in Future.—It has been held that if a bank promises to accept checks at a future day, such acceptance is valid, but it must be for acceptance within a reasonable time. What is a reasonable time is a question of fact to be determined in view of all the circumstances of each particular case. It has been held in Iowa that seventy days was not unreasonable.

131a. Inquiry Regarding Checks.—If Bank A certifies a check drawn by X, and subsequently the bank is asked whether a certain check drawn by X and certified by it is all right, what is the liability of the bank to the holder? The courts differ on this question, but from the facts of each particular case they cannot be said to conflict. As the bank can ascertain whether the amount of the check is the same as when it certified, and it is held to know the state of the depositor's account and his signature, if care is exercised by the one making the inquiry, and due diligence on the part of the bank, liability and hardship can be avoided. The question will be one of fact as to whether the bank simply meant that a certification had actually been made, or whether it meant that the amount shown at the time inquiry was made was correct. Where an inquiry is made by telegraph or telephone, and the officer who answers the inquiry does not see the check, his statement that it is all right has been held to refer merely to the genuineness of the signature and the sufficiency of the fund to the credit of the depositor to meet the amount stated in the check at the time it was certified.

If a check is left with, or sent to, a bank, with an inquiry as to whether it is good, the mere retention of the check by the bank will not in itself operate as a certification or acceptance. *Matteson v. Moulton*, 79 N. Y., 627; *Crawford's Annotated Neg. Ins. Law.*, p. 155. A recent Pennsylvania case holds that where a bank delayed for two days before refusing check it was equivalent to an acceptance under the Negotiable Instruments Law, which provides that where acceptance is not made within twenty-four hours or refused, the drawer will be held to have accepted. *Wisner v. Bank*, 68a, 955. But a check is usually not presented to a bank for acceptance, but for payment. As the bank has a right to investigate the depositor's account and the genuineness of the signature, it should have a reasonable time to ascertain these facts. But due diligence should be exercised in answering such inquiries when made by letter or telegraph. If a check is simply left with the bank, the one who has left it should be diligent in applying for the bank's answer to his inquiry. After a reasonable time the bank should either pay the check or advise him of its worthlessness. But the bank is under no obligation to put itself out for the purpose of conducting an information bureau.

131b. After a certified check has been delivered, it cannot be countermanded; but before delivery the maker can have the check canceled and the amount again placed to his credit. And the bank can countermand, or cancel, the certification, if the one for whom it was certified has not delivered the check or has not acted to his detriment by reason of the certification; but where in the hands of a bona fide holder it can not be countermanded. *First N. B. v. Union Trust Co.* (Mich.), 122 N. W., 547.

No matter what position the bank may be in, it cannot charge the depositor for any certification where it could not charge him with payment. See Sec. 142.

131c. False Certification.—Section 5208 of the Revised Statutes of the United States provides as follows:

"It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

Section 5234 provides that the Comptroller of the Currency may appoint a receiver to wind up the affairs of the bank.

It will be noted that, while false certification is punished, if the officer has authority to certify, but wrongfully certifies, the bank becomes liable on the check. The Act of Congress of July 12, 1882, provides as follows:

"Sec. 13.—That any officer, clerk, or agent of any national banking association who shall willfully violate the provisions of an act entitled 'An act in reference to certifying checks by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court."

Most of the states also have statutes making it a crime to falsely certify checks.

See *Thompson v. St. Nicholas Natl. Bank*, 146 U. S., 240; *Chadwick v. U. S.*, 141 Fed., 225; *U. S. v. Heinze*, 161 Fed., 425.

131d. But where a holder procures certification with no-

tice of facts which make the certification dishonest, he is not a bona fide holder. *First Natl. Bank v. Union Trust Co.* (Mich.), 122 N. W., 547.

131e. Memorandum Check.—A memorandum check is a check given by the drawer to the payee named therein, not to be presented at the bank for payment, but as evidence of an obligation of the drawer to the payee, or as a memorandum of the indebtedness. It may be marked "Memorandum," or "Memo," and so marking it makes it a memorandum check. The payee can proceed against the drawer as on a note, and need not present it at the bank. But if he does present it and the bank pays it the maker will be liable to the bank. The words "Memorandum," or "Memo" the bank need pay no attention to. As between the drawer and the bank it is the same as any other check. As between the drawer and the payee it is a "due bill," and if the payee uses it contrary to his agreement with the drawer, he becomes liable to the drawer. As to other parties to whom it is negotiated the drawer is liable as on a note, and presentation at the bank is not necessary to bind him, as he did not intend that it should be presented. *Franklin Bank v. Freeman* (Mass.), 16 Pick., 535; *Cushing v. Gore*, 15 Mass., 68; *Dykers v. Bank*, 11 Paige (N. Y.), 612.

CHAPTER VII.

NONPAYMENT AND MISPAYMENT.

132. **Refusal to Pay.**—When a depositor draws a check against an account actually sufficient to meet it, the bank must pay. If it dishonors a check, it makes itself liable: in some states to the depositor only; in others to the holder of the check. As in most states a check is not an assignment, the majority of courts hold that no one has a right against the bank except the maker of the check, unless the bank has accepted or certified. It has been held in some states that where a check is paid to the wrongful holder, this is equivalent to an acceptance of the check of the drawer and gives the real owner a right against the bank; but this is not the rule in most states; and the Negotiable Instruments Law provides that an acceptance must be in writing, so that a wrongful payment might not now be held to be an acceptance under that law.

133. **Must Answer to Depositor.**—But to the depositor the bank must answer, if it refuses to pay his orders so long as it has funds of his sufficient to meet the orders. As we have seen, there is an implied contract that the bank will honor his orders. A bank may have just reason to refuse to pay, as where it has a lien or right to set off the depositor's balance against a debt which he owes the bank. See Sec. 165. But where he actually has sufficient unincumbered funds, the bank must pay. If the deposit has been attached, or the bank enjoined from paying, it can of course refuse to pay. *Zimmerman v. Murphy*, 131 Ill. App., 56.

134. **Amount of Damages**—A refusal to pay gives the

depositor a right of action against the bank, for damages. In what amount the damages will be laid depends upon all the facts and circumstances. If there is anything to indicate that the conduct of the bank was wilful, or that it delayed to make reparation, the bank would be liable not only for the amount involved in the dishonored paper and interest thereon, for which it will always be liable, but also for such damages as a jury might find were suffered by the party in the harm done his credit, his reputation, business, etc.

An innocent mistake on the part of a clerk has been held to give no ground for the jury to "mulct the bank," though in that case \$600 damages was awarded for refusal to pay checks aggregating \$318. Though no actual damage is shown, usually nominal damages, i. e., in an amount to give the depositor at least something, perhaps only the interest on the amount, for the wrong done him, can be recovered. Sometimes a jury might be warranted in finding one dollar, one cent, etc. All the circumstances must be weighed.

When no real loss is incurred, no wilful refusal on the part of the bank is shown, and the check is finally paid, only nominal damages can be recovered. However, a depositor will usually be given substantial damages, over and above the actual amount of the checks unpaid and interest, when a bank without just cause refuses to pay his checks, even though no special damage is shown. *Clark v. Bank*, 83 N. Y. S., 447. Such a refusal is bound to work harm to the one whose check is dishonored. Some cases have held that where the check of one engaged in trade is wrongfully dishonored the bank is liable, but later cases make the bank liable even where the depositor is not engaged in trade. His credit, reputation, and standing are as susceptible to injury through a refusal to pay as the character of one engaged in commercial pursuits. Sometimes the smaller the check,

the greater the injury done. The jury must determine from all the circumstances what damages have been incurred. The wrong done is in the nature of a slander, besides being a breach of contract, and any special damages suffered can always be recovered when proved. Generally nominal damages only can be recovered in an action on the contract, unless special damages can be proved, but in a tort action for the wrong done, substantial damages can be recovered in any event. Where the bank has not been negligent, and where upon discovering its mistake it immediately takes steps to correct same, the court will not allow an excessive verdict. The check must have been presented at the bank, during business hours, and payment actually refused. The mere privilege given a depositor, to draw against items deposited for collection, does not give him an absolute right to draw, and if items are not paid the bank can charge them back, and if by so doing the account is insufficient to meet a check, the bank can refuse to pay.

When a check is presented which bears notice of any irregularity, the bank might save itself from liability for a refusal by making a qualified refusal, or requesting a short time to investigate, and thus prevent a loss in case its suspicion should be well founded.

135. Lost Checks.—Usually when a check is lost the drawer stops payment of the lost check and issues a duplicate, marking it "Duplicate." The same rights and liabilities attach to the duplicate as existed in or under the lost check. If one who endorsed the original also endorses the duplicate, he is liable only to the same extent as on the original, and time in which presentment must be made to bind him is reckoned from the time of the delivery of the original.

136. Lost After Endorsement.—If a check has been lost after endorsement and comes into the hands of a bona fide holder to whom the bank pays, the money cannot be

recovered back from him; and if the bank has been ordered to stop payment, such bona fide holder can recover from the maker and prior endorsers. Where the check has been lost after endorsement, or is payable to bearer, the drawer may demand a bond of indemnity before issuing a duplicate, as he will be liable to a bona fide holder, and the bank can safely pay to a bona fide holder when a check has been lost after endorsement in blank by the payee, and payment not stopped.

136a. Where the check is not payable to bearer, and if payable to order has not been endorsed, the drawer will not be liable on it. He can stop payment at the bank and should immediately do so.

137. **Paid Checks.**—The bank, upon making payment, should require a surrender of the order, as a voucher of payment to the holder. The surrendered checks should be held by the bank until the customer's pass-book is balanced, when a return of the check with the balanced book, and an acceptance without objection made by the customer, if not binding on him, is at least good evidence toward proving payment by the bank for him. Where the check is an overdraft, the bank should hold it as evidence of the indebtedness of the drawer. Paid checks also serve as evidence of payment by the drawer to the payee.

FORGERY.

138. **Forged Signature of Drawer.**—The bank must follow strictly the orders of the depositor, and where it pays on a forged or altered check it cannot charge the customer. Under the Negotiable Instruments Law a forged signature is declared to be wholly inoperative against any person whose name is forged, and a material alteration vitiates the instrument as against any person whose name appeared thereon when altered, except that a bona fide

holder may recover not to exceed the amount for which the instrument originally stood. But besides this enactment, a bank has generally always been held to a knowledge of its customer's signature. In this most courts have agreed, but the difficulty appears to be upon the question of the right of the bank which has paid to a bona fide holder of a forged instrument to recover back the money from him.

139. The bank is under no obligation to pay a void order. If it does, and the question is as to whether the bank or an innocent holder should suffer, it would seem that where the bank alone has been at fault, being held to know the drawer's signature, the money ought not to be recovered, and so the cases have held. But if the one who presents the check is at fault, as where he ought to know, from the circumstances under which he took the check, that it might be invalid, and he leads the bank into a belief that the check is genuine, the bank should be allowed to recover. If the drawer directs a bank to pay without requiring proper identification or assuring itself of the genuineness of the signature, the drawer must suffer the loss. See Sec. 88e.

140. **Bank Guarantees Drawers' Signature.**—In a recent New York case, under the Negotiable Instruments Law, it has been held that where a bank pays a check it guarantees the signature of the drawer, and therefore cannot recover the money paid on a forged check to an innocent holder in any event. *Trust Co. v. Haven*, 111 N. Y. S., 305. The earlier cases held that the money could not be recovered where the party who received the money had not been negligent and where to make him return it would place him in a worse position than if the payment had been refused in the first instance, and in some states recovery can be had. See Sec. 112.

141. **Forged Endorsement.**—Where a check validly drawn, but bearing a forged endorsement comes into the hands of a bona fide holder to whom the drawee bank pays

upon his endorsing the check, the bank is not presumed to know, and does not guarantee, the endorsements, and it can recover the money paid to the holder, but cannot charge the depositor. *Jordan Marsh Co. v. Bank*, 87 N. E., 740. By endorsing to the bank the holder guarantees the prior endorsements, but does not guarantee the signature of the drawer. This the bank is presumed to know. *Farmers & Merchants Bank v. Bank of Rutherford (Tenn.)*, 88 S. W., 939.

142. Raised Checks.—So, as the bank is not presumed to know and does not guarantee the writing in the body of the check, it can recover money paid on a raised check. Of course, as between the bank and the depositor, it can charge the depositor only the amount paid on his valid orders, except where he by his negligence causes the loss, and it cannot charge more than the original amount of the check to him.

143. Wrongful Payment an Acceptance.—It has been held that where a bank pays a check on a forged endorsement and charges the amount to the drawer and settles with him on that basis, this is equivalent to an acceptance by the bank and gives the rightful owner of the check a cause of action against the bank on the check. Other cases have denied the right against the bank on the check but allow a recovery by the holder on the ground that, having charged the money to the drawer and not paid it to the right party, the bank holds money which in equity and good faith it ought to pay to the holder. In still other cases the holder is given no right against the bank unless a check has actually been accepted, and he must recover from the maker, the maker having the right to go against the bank for wrongfully paying on a forged endorsement.

144. Depositor Not Bound to Know Signature of Endorser.—A depositor is not presumed to know the sig-

natures of payees of checks and is not bound to examine endorsements on returned checks.

145. Adoption of Forged Signature.—If A himself issues an instrument on which his signature has been forged, he is liable on it. Anyone who holds out a signature as his own will be bound thereby to any bona fide holder. Where a forged check has already been paid by the bank and the bank asks the customer whether it is genuine, the customer is not estopped, if he acknowledges the signature, to afterwards deny it if he discovers it to be a forgery. The bank has not been led into paying the check on his statement. But where the bank states its suspicions and that it cannot save itself unless it acts promptly, the customer should make a very careful examination before admitting the signature, or he will be bound.

146. Diligence in Discovering.—We have already discussed the matter of diligence which a depositor must exercise upon a return of paid checks by the bank. What is negligence in delaying to discover a forgery depends upon the facts and circumstances in each particular case. Sometimes a day's delay might be negligence, while in other cases six months might be justified. See Sec. 42.

The government is held to the same degree of diligence in discovering forgeries and giving notice thereof as is an individual. *U. S. v. Bank*, 28 Fed., 357.

A few cases are here given of the numerous complications brought about by the rascality of forgers and criminals.

a. A made an arrangement with a bank whereby the bank was to cash checks drawn by A's agent. From time to time the bank was to draw on A for the amount of checks cashed, forwarding the paid checks with the draft. The checks were supposed to be given by the agent for corn purchased for A. The agent, instead of issuing checks for corn, issued checks in the names of different persons and

then himself endorsed these names on the checks, and also his own name, and had the bank cash them. The court held that A could not recover the money which he had paid on the bank's drafts, as the bank was not negligent in receiving and paying such checks of the agent so long as A, upon receiving the paid checks, did not discover and notify the bank of the fraud. *Armour v. Greene County State Bank*, 112 Fed., 631.

b. A was bookkeeper for X. Having made up and procured X's signature to pay roll checks, A raised and cashed them, keeping the amount in excess of what they were signed for. When the checks were returned as vouchers A reduced the amounts in them to correspond with the amount for which they were originally drawn and also reduced the amounts in the bank's statement to correspond with the amounts shown by the checks. A then notified his employer, X, that the statement of the bank and paid checks as reported were correct. X had the accounts of A audited monthly. The court held in this case that A was not negligent in leaving the examination of the accounts to the auditor and that the auditor's failure to examine the statements was not negligence. Under all the circumstances X was diligent. *Clark v. National Shoe and Leather Bank*, 52 N. Y. S., 1064.

c. Where A presents to the X bank a check drawn on Y bank and the X bank pays it to A, without inquiry or identification of A, the X bank then endorses it and collects the money from the Y bank, the Y bank relying on the endorsement of the X bank and therefore not making a rigid examination of the signature, and subsequently the Y bank learns that the check was a forgery, the Y bank upon promptly notifying the X bank can recover the money. Having already paid the check to A, the X bank is in no worse position than it would have been if the Y bank had refused payment upon presentation. While it might have

been better able to recover from A, it had parted with the money before it asked payment of the Y bank and besides, by its endorsement it would, under the Negotiable Instruments Law, be liable.

d. A had an account in bank B in the name of "A, Executor," but no individual account. X forged A's individual signature to a check, which was paid by the bank and the check charged to the account of "A, Executor." By reason of this mistake it was three months before A was made aware of the forgery and the bank notified. The court held that it was the bank's negligence, and not A's. *Bank v. Bank*, 58 Ohio S., 207.

e. H, under the name D, secured a loan from X, giving a note and mortgage in the name of D, representing that he was D and that he owned the land standing in D's name. The loan was made and a check given payable to D, drawn on the Y bank. H endorsed the check in the name of D and again as H. The court held that H was the intended payee, and not D; that as between the bank and H, H was entitled to payment, and the bank, having no notice of the fraud, was not liable to X for the amount of the check. *Meyer et al v. Indiana National Bank*, 61 N. E., 596. In this case, while H represented that he was D, it was the person of H to whom X intended to make the loan. While it is true that it was made in the name of D, it was a question of identity of the person, and while H forged the mortgage and the note, the check on which he obtained the money was intended for H, though in the name of D. Where the loss lies between the bank, who paid to the identical person to whom X made the loan, and X, who should have been primarily held to ascertain the identity of H, it seems proper that X should lose. The check was intended for the person—not the name. *Canadian Bank of Commerce v. Bingham (Washington State)*, 71 Pac., 43.

f. In Rhode Island, where the Negotiable Instruments

Law is in force, it has been held that a signature made under circumstances similar to those stated in the preceding paragraph was a signature made without authority, and therefore "wholly inoperative," under the law. *Tolman v. American National Bank*, 22 R. I., 462.

g. But where the check is delivered to the person intended, though under a different name, and he forges the name and transfers it to a bona fide holder, the bank would not be liable, as the mistake should be laid to the drawer.

Attention is called to the holdings in the states where the Negotiable Instruments Law is in force, as the decisions under this law in one state are likely to be followed in other states (though not necessarily so) to bring about the uniformity which the Negotiable Instruments Law was meant to effect.

CHAPTER VIII.

RIGHTS OF THIRD PARTIES AND INCIDENTS
OF DEPOSITS.

147. **Attachment and Garnishment.**—When B owes A a debt, if A sues and gets judgment against B, B's property is subject to attachment for payment of the judgment. In some states an attachment may be had in any case before judgment; and in most states it can be had before judgment against the property of one who is not a resident of the state, or who is about to take his goods out of the state, or leave the state, to defraud creditors. By attachment the property is usually placed in possession or under control of the sheriff, marshal or other officer, until the judgment is rendered, when the property is sold and judgment paid out of the proceeds, and in case of money, out of the fund attached, unless judgment is for the defendant, B.

Now, if Bank C owes B, or has property belonging to B, A can attach this debt or property in C's hands. This attachment of property in possession of a third party is called garnishment. The bank would be the garnishee. If B has a deposit in bank C, which is actually B's, or for which the bank is indebted to B, A can have the deposit attached, whether it be a credit balance, special deposit, or money on general deposit which B has borrowed, so long as it is B's money as between B and the bank. If it is B's money, though standing in the name of X, it can be attached for B's debt, if A can prove that it is really B's. *Des Moines Cotton Mills Co. v. Cooper*, 93 Iowa, 654. The bank must hold all funds actually belonging

to B, even though they may stand in another's name at the time service of the attachment is made, and in some states any subsequently received, until the attachment is discharged. It must not pay any checks after service of the attachment, even though the checks were drawn before service (*Banking Co. v. So. Pac. Co.* [Cal.], 71 Pac., 93), except in those states where the drawing of a check is an assignment of the money to the payee of the check.

148. Where Check Certified.—Where the bank has certified a check before the attachment, which check has been delivered to the holder, as the amount of the certified check has been set aside, the bank now being debtor to the holder of the check, this amount can not be attached. Of course, the one who attaches secures a lien only on that which the depositor himself could have taken; and where B deposits in his name money belonging really to X, the money cannot be attached as B's. The question is, is it B's property? If so, it can be attached for B's debt. If X's it can be attached as X's.

149. Items for Collection.—If A deposits items for collection, the amount represented by such items can not be attached until they are collected—until A would have an absolute right against the bank for the amount. The fact that he may have the privilege of drawing checks against credit given would not give him an absolute right to do it.

150. Money Assigned.—We have noted that a check is not an assignment of the fund. It is merely an order to the bank to pay, and until paid the money does not become the property of the payee of the check. But the depositor can part with his interest in the fund by transferring it by an assignment instead of by check. And where he does so, the assignee having the superior equity in the fund, it can not be attached as property of the assignor, the depositor.

It should also be noted here that in some states, even where a check for a part of a deposit has not been regarded as an assignment, a check for the entire balance has been regarded as an assignment. The reason for the distinction is not very satisfactory, but as the Negotiable Instruments Law provides that a check shall not operate as an assignment of "any part" of the fund, it is probable that the courts in those states where the distinction was formerly made will wipe out the distinction, even though to some the words "any part" may seem ambiguous. The act having been passed to bring about a uniformity in the law, this end will be facilitated by holding that no check is an assignment.

151. Particular Fund.—It has been held that where a check is drawn against a particular fund, as in payment for wages, out of money set apart for that purpose, the check is an assignment, and the holder is entitled to take the money rather than an assignee for the benefit of creditors. This works no hardship on anyone, as the wage-earners are usually entitled to preference over other creditors, and an order drawn against a particular fund is not a negotiable check. Neg. Ins. Law.

152. Presumed to Belong to One in Whose Name Deposited.—If a deposit stands in the name of A, and the bank has no notice that it is not A's, the bank cannot be held liable for paying the money on attachment for A's debt.

153. Property in Bank Subject to.—Property of a national bank, and in some states that of a state bank, cannot be attached for a debt of the bank, no matter in whose hands. *Pacific Nat'l Bank v. Mixter*, 124 U. S., 721; *Van Reed v. Bank*, 198 U. S., 554, and a state court cannot issue an injunction against a national bank before final judgment. *Nat'l Bank v. Mixter*. But the property which the bank holds, belonging to another (not such

bank or national bank) can be attached in the hands of the bank for the debt of the depositor or creditor of the bank. *Earle v. Pennsylvania*, 178 U. S., 449, and see page 456.

154. Is a Check Payment.—If A owes B and gives B a check for the amount of the debt, this is not a payment of the debt until the check is paid, i. e., the original debt can be sued on if the check for any reason is not paid, unless it is the intention of the parties that the debt should be extinguished by the check. Of course, if the one who receives the check is negligent in presenting it for payment, the loss is his. See Sec. 89. And it is payment if taken for a debt by the bank on which drawn.

But, while a check is not an assignment, and even though the check is not an absolute payment of the debt to B until the check is paid, when A delivers to B a check for his debt, it is so far considered payment that A can not be garnished by creditors of B.

155. Statutes of Limitations.—Where A owes B, B should be diligent in enforcing his rights against A. If he let the debt run on for years, both B and A may forget the circumstances connected with the incurring of the debt. If either should die after the debt has been due for some years it would be difficult for the estate to prove or disprove, respectively, the debt. For this reason statutes are enacted to prevent litigation founded on claims so old that there might be questions as to their origin or validity and difficulty in establishing just claims where they exist. These statutes are termed Statutes of Limitations. They generally provide that after a certain time subsequent to the date on which the right accrues, no suit can be brought. The creditor still has his right against the debtor, but the law will not allow him to enforce the right. His remedy is gone. This is the substance of the statutes, though in some states it has been held that the

right itself is barredred. We need not discuss here the effect of a statute which bars the right as well as the remedy for enforcing that right. When the creditor has the right to sue, from that date the time is reckoned; then the Statute of Limitations commences to run.

156. Demand Must be Made Before Statute Will Run.—As the contract by the bank is that it will pay on demand, it is generally held that a demand upon the bank, for payment, is necessary before suit can be brought against the bank. And until a demand is made the Statute of Limitations does not begin to run. In some states it is held, however, that where a statement of account is rendered by the bank (and return of pass book balanced is regarded as such statement) the depositor has a right against the bank from that date for that amount, and that at that time the statute begins to run. As the depositor has not demanded payment by leaving his book for balance, and as the money is not due until a demand of payment, no action could be brought before demand against the bank, and the statute ought not to be held to run until there has been a demand. The return of pass books balanced is in no sense a refusal by the bank to pay the balance; and the courts in the majority of states hold that there must be a demand upon and refusal by the bank before the statute commences to run. When the depositor does not object to the amount as shown by his pass book when balanced, of course, it would be reasonable to hold that he could not bring suit for the difference between that amount and what he claims it should be after several years, where he has been negligent.

157. No Demand Necessary Where Bank Commits Wrong.—Of course, if the bank commits a wrong it is liable to suit as soon as the wrong is perpetrated, and the statute begins to run at once, without demand. Having done a wrong, the bank has waived the demand. If the

bank notifies the depositor that it claims the money, or that it will not pay his checks, or if it fails, no demand is necessary. Otherwise demand should always be made upon a bank before suit is brought for recovery of a deposit.

158. Against Drawer of Check.—Where a drawer has no funds in bank and gives a check, he commits a wrong, and no demand need be made on him before the right to bring an action accrues, and therefore the Statute of Limitations commences to run as against him as of the time payment is refused. See Sec. 194.

159. Where Bank Refuses Payment.—The right to sue a bank for dishonoring a check accrues as soon as the refusal has been made upon demand or presentation of a proper order, and the statute commences to run from the date of the refusal.

As against Certificates of Deposit, see Sec. 49; certified check, 128.

160. Payment by Mail.—If A requests the bank to send him a check, currency, exchange, etc., by mail, A makes the mail his agent, and if the bank sends it in the manner requested, the bank will be discharged as soon as the item is deposited in the mail addressed as A directed. So if A requests that it be sent by express, or in any other manner, strict compliance with directions releases the bank as soon as the item is delivered to the carrier designated or his agent. The bank's duty is to pay the depositor at the bank. If the depositor asks for transmission of money without naming the carrier to be used, any safe method used by the bank will discharge it from further liability. Currency, paper negotiable by delivery, or coin should be registered or sent by express. The bank must always exercise care in receiving or paying deposits.

161. Deposit Made by Mail.—When a deposit is mailed

to the bank the depositor makes the mail his agent. The bank is in no case liable until the money is delivered to the officer of the bank, and a deposit dates from the receipt of the money.

162. Check.—If A mails a check to B, the title remains in A until the check has been delivered to B, unless B has requested it sent by mail, in which case B makes the mail his agent and delivery to the mail is delivery to B. As the debtor must seek the creditor, unless the creditor has designated an agent to act in accepting payment, payment is not made until there is a delivery to B himself. *Garthwaite v. Bank of Tulare*, 134 Cal., 237. See Sec. 64.

163. Interest on Deposits.—Unless there is a contract for the payment of interest, a depositor is not entitled to interest. When demand is made for a deposit, however, the money immediately becomes due and if the bank fails to pay, it is liable for interest at the legal rate. *Lowndes v. City Nat. Bk.*, 72 Atlantic Rep., 150. When a bank fails, the suspension renders it impossible to perform its duty to pay if demand is thereafter made, and no demand need be made. The suspension is equivalent to a demand and refusal to pay and the depositor is entitled to interest from the date of failure. *Nat'l Bank of Commonwealth v. Nat'l Bank*, 94 U. S., 437. If the bank resumes business he is entitled to interest at the legal rate. However, depositors are usually anxious to assist the bank and its officers in putting the bank on its feet again and they will generally waive their right to interest under the circumstances. If the bank does not resume, interest is usually paid creditors from the date of the failure until final payment, if the estate is sufficient, but otherwise a claim is entitled to no interest as against the receiver, unless it would be entitled to it as against the bank at date of failure.

164. Where a bank wrongfully pays out the money of a depositor, he is entitled to interest, even though he would have let the money remain in the bank and was not being allowed interest. *Savings Bank v. Nat'l Bank (Iowa)*, 70 N. W., 769. Where he is drawing interest at a less rate, but is at liberty to withdraw at any time, refusal to pay gives him the right to interest at the legal rate from the date of the demand and refusal or the wrongful payment. As to interest on certificates of deposit, see Sec. 49.

165. **Lien.**—In most states when a debt of the depositor to the bank matures, any securities which the bank holds for the depositor, in the regular course of business, may be held until payment of the debt. The right to hold the property to secure the debt is called a banker's lien.

166. If a bank holds negotiable paper for collection for the depositor, or the proceeds of collections, although received by the bank before the debt to it became due, the banker's lien attaches when the debt is due, but not before. *Nat. Bank of Phoenixville v. Bonsor*, 38 Pa. Super. Ct., 275.

167. **Collateral and Special Deposit.**—Where security is given to a bank under an express agreement that it is collateral to a specific indebtedness, then no part of that security, or the proceeds thereof, can be applied except in payment of the debt expressly secured. A special deposit or a deposit of money or property made for any specific purpose cannot be diverted from that purpose and applied by virtue of such lien or right of set off. Under such circumstances no lien arises except such as is expressly contracted for. *Furber v. Dane (Mass.)*, 89 N. E., 227; *Van Zandt v. Hanover Nat'l Bank*, 149 Fed., 127. Affirmed in U. S. Supreme Ct., not yet reported.

168. Notes Presented for Discount.—Where a depositor is indebted to the bank and he presents notes for discount, the bank cannot discount the notes and immediately use the proceeds of the discount to extinguish other debts past due; but when the notes so discounted fall due the lien of the bank attaches as to his general deposit or securities held by the bank which it obtained in the regular course of business. And where notes are sent to a bank for discount, and the bank refuses to discount them, it must return them to the sender, and cannot acquire a lien in this way. *Hanover Natl. Bank v. Van Zandt*, — U. S., —.

169. Set Off.—Akin to the banker's lien is the right of set off. If A owes B, and B owes A, an action by A against B, at law, formerly would give B no right to set up A's debt to him as a defense. His only remedy was to also sue A. Thus there would be two actions. Courts of equity, however, afterwards allowed what is called a set off, permitting the one claimant to set off his claim against the claim of the other, adjusting the two claims in one suit, to prevent a useless multiplicity of suits. So where A owes the bank and the bank owes A, in the regular course of business, the bank can offset what it owes A against his debt to the bank.

170. When Right Attaches.—The fact that the debt is *due* gives the bank the right to the lien, regardless of whether the bank has actually made the application and, therefore, a check presented after the lien has attached will not have any rights prior to the right of the bank, even though the application has not been made and the bank's books show a balance due the depositor. The question is whether the lien has attached, not whether the money has been applied by the bank. In a few States there is no lien without an express contract to that effect, and in some States the bank must notify the de-

positor before it will have a prior right to apply the depositor's property on his debt.

171. What May Be Subject of.—Property belonging to two persons jointly cannot, as a rule, be applied on the indebtedness of one of them, or vice versa. The debtor on the obligation must be identical, in law, with the creditor to whom the property or deposit in the hands of the bank actually belongs.

A deposit by an agent, of his principal's money, does not give the bank a right to set off the deposit against a debt of the agent. *Shawnee Natl. Bank v. Wootten & Potts*, 103 Pac., 714.

171a. A deposit of a partnership could not be offset against a debt of an individual member of the partnership to the bank, and vice versa. *Scammon v. Kimball*, 92 U. S., 362. A debt of A cannot be offset against a deposit of A as executor or trustee of B. *In re Hauenstein*, 101 N. Y. S., 917. The property of one person cannot be offset against the debt of another. *Mingus v. Bank of Ethel*, 117 S. W., 683 (Mo.) We have considered who is the real owner of a deposit. See Sec. 39. But where a bank receives the money not knowing that it is not the depositor's, applies it on his note and surrenders the note, the true owner of the money cannot follow it into the hands of the bank. 78 N. W., 238 (Iowa).

171b. Statutes.—In most states the right of set off is regulated by statute. The right to set off depends upon the law of the state where the deposit or property is held by the bank, that being the place where the bank would have to be sued, and the right depends upon the law of the place where suit would have to be brought to determine the controversy.

172. In Case of Insolvency of Depositor.—Generally when a depositor becomes insolvent the bank may make the application of his deposit against any debt due to

the bank. In some states the bank can set off the deposit though the note is not yet due. *Assignee v. Bank* (Ky.), 13 S. W., 910. In others the debt must be due. *Bank v. Bank*, 56 Nebraska, 803. If a depositor becomes insolvent and his estate is adjusted under the bankruptcy laws of the United States, "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." *Tomlinson v. Bank of Lexington*, 145 Fed., 824; *N. Y. Co. Bank v. Massey*, 192 U. S., 138. It must be an indebtedness that is due at the time of the filing of the petition in bankruptcy.

173. Instrument Payable at Bank.—The Negotiable Instruments Law provides that where an instrument is "payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." Except in one or two states, the bank is under no obligation to use a deposit which is smaller than the amount of the note.

173a. And the better rule is that the bank cannot make the application before the paper is due, without the depositor's consent. When due the application should be made.

174. Insolvency of Bank—National.—When a national bank fails, the deposit balance of a depositor can be offset against any debt of the depositor, whether due or not. *Scott v. Armstrong*, 146 U. S., 499. This, in effect, gives the debtor to the bank a preference. In some states this rule is followed. In others the debt must be due. But the claim against the bank must be held at time of failure. If acquired subsequently it cannot be offset.

175. Preference in Bankruptcy.—Where one who is insolvent deposits money in bank within four months

prior to his bankruptcy, and the money is subject to check, this does not constitute a preference, although the bank may be a creditor and have the right, under Section 68a of Bankruptcy Act of July 1, 1898, to set off the bank's claim against the balance of the deposit. But where the bank holds a claim against an insolvent, which it has acquired from some one else, and the insolvent pays the claim to the bank, this is a payment which constitutes a preference under the said act, and the bank must surrender the preference before it can prove any *Geo. M. Hill Co.*, 130 Fed., 315; *In re W. W. Mills Co.*, 162 Fed., 42.

176. Right to Set-off May Be Waived.—When the right to set-off exists it must be demanded at time of payment of counterclaim, otherwise the right is lost and the money paid cannot be recovered.

177. Death of Depositor.—Upon the death of a depositor, or any other person to whom the bank is in any way indebted, no payment should be made except to a duly appointed administrator or executor. Death revokes all checks, in most states, and the bank should certainly not pay any checks after it has notice of the death. See Sec. 101. Any bona fide holder of a check will have a claim against the estate. If the estate is solvent he will get his money, but if the estate should be insolvent he is entitled to receive only his pro rata share of the estate, along with other creditors, and a payment by the bank after the death of the depositor would give the party who received payment a preference over other creditors. The balance of the deposit becomes the property of the estate. In some states a specified time after death of depositor is allowed, in which checks may be presented and paid at the bank.

178. Upon the death of a depositor, his executor or

administrator is alone entitled to withdraw any balance to the depositor's credit. Sometimes, when the estate is very small and the money in bank is practically the only asset not in possession of the next of kin, the bank may safely pay the money to the undertaker who buries the deceased, where the state statute gives the undertaker priority of payment over all other creditors. If there is more than sufficient for this purpose, other prior claims might be paid; but when any such further payments are made by the bank they are made at the bank's peril.

179. It is safest to pay money of a deceased depositor only to the executor or administrator; that of an insane person, to the guardian or committee; that of an infant, only to the guardian, except in some cases where the infant has himself deposited the money in a savings account (see Sec. 59); and that of an insolvent or bankrupt depositor, only to the receiver or trustee in bankruptcy. These representatives of the respective estates are appointed by the court, and when vested by the court of your own state, territory or district with jurisdiction, your bank will have to pay to such representative when proper demand is made by him. It is usual for the representative to file with the bank a copy of his appointment, certified by the clerk of the court; but if no copy is filed, the original should be exhibited and the bank made sure of his authority. See Sec. 36.

180. Local Court Should Appoint Legal Representative.—The representatives named usually have no power to act beyond the limits of the jurisdiction of the court which made the appointment, and the payment should be made only upon the order of a representative duly appointed by the court of the state, territory or jurisdiction where the bank is located.

Usually where the primary administrator, etc., has been appointed in one state, another state will reappoint the same person or persons as ancillary administrators, etc., if rights of creditors or citizens of the latter state will not be prejudiced thereby. But an ancillary representative should be appointed. Minor on the Conflict of Laws, Secs. 104, 113.

CHAPTER IX.

GIFTS OF DEPOSITS.

181. There is much seeming and a good deal of real conflict in the decisions of the courts of the different states concerning gifts and gifts in trust of bank deposits, checks, etc., Therefore, only the general principles underlying the law of gifts will be here stated.

We have seen that one in whose name a deposit stands is presumed to be the owner until title in another is shown; but when ownership is proved the true owner is entitled to the money and to him the bank will be liable. So long as the bank has no notice, and in some instances no reason to believe, that the money belongs to another, it can pay to the one who, between the bank and himself, is the depositor and owner. But when there is a disputed ownership the bank must be careful to pay to the right one. When gifts are made, therefore, while the bank is made no better nor worse by the mere giving of the thing, it is frequently put into a position where it does not know just what to do. In most such cases the better thing to do is to refuse to pay to any claimant without the consent of all, and if suit is brought by one, to pay the money into court and let the court determine the rights of the parties, taking a bond of indemnity from the plaintiff before paying over the money. Or it may pay to the one appearing to have title to the money upon his giving bond. If the bank wishes to have the question of ownership determined, and neither party takes the step to have the question settled, the bank may be permitted to bring a bill of inter-pleader, asking

the court that these parties be brought in and have an adjudication of their rights. In such case the bank will not suffer any loss by way of expense, etc. Whether such bill can be brought is a question of local practice. The bank could not ask the parties to interplead if it had any interest in the money itself; but where upon the death of a depositor there is money in bank, the ownership of which the bank wishes determined, the right may be given. Where the parties can agree upon a settlement the bank can pay under such an agreement, but should always require a written release from all parties concerned, and as an agreement to do something which is contrary to law could not bind one, great care should be taken.

182. Gifts.—Upon the death of a person having money in bank claims are apt to be made by various persons that the decedent made a gift of the deposit. If a valid gift can be proved, the donee is entitled to it. There may be several claiming as a gift. At the same time the administrator or executor might claim it. The bank must pay the rightful owner or it will be called upon to pay again.

A gift is, generally speaking, a voluntary, gratuitous transfer of the title and possession of personal property by one to another. Gifts are of two kinds; gifts *inter vivos* and gifts *causa mortis*.

183. Gifts Inter Vivos.—A gift *inter vivos* is a gift made to take effect during the lifetime of the giver (called the donor). To be valid, there must be an intent on the part of the donor to vest the title in the donee (the one to whom given) and a delivery of the thing to the donee, or to another for him, though the delivery need not necessarily be made at the same time the intention is expressed, so long as there be a delivery to complete it. There must also be an acceptance by the donee, though

this is usually implied from the conduct of the donee, and in some states it is held that the donee need not even know of the gift.

The intent must be clearly shown as a gift will not be presumed. There must be something more than mere words. There must be a delivery of the thing. If it is not capable of actual delivery at the time, there must be such conduct on the part of the donor as can be construed as a clear intention to part with the dominion over the property. The delivery of a written instrument which is evidence of property, when executed by the donor, would be sufficient delivery. Contract rights can be delivered only by a delivery of the written evidences of those rights. And where circumstances make a manual delivery impossible, as where one is ill and wishes to deliver a box, trunk, etc., which he cannot reach, or which is too large, a symbolical delivery, as the delivery of a key, will suffice. There must be some act manifesting a clear intent on the part of the donor to surrender dominion over the thing. The health, conditions, surroundings, and all the circumstances must be considered in determining whether the donor parted with the ownership. Where the donee is already in possession, it is not necessary that there be a delivery by him to the donor and a redelivery by the donor to the donee. A clear indication of an intent to vest the title in the donee will suffice.

183a. Where delivery is made to an agent for delivery to the donee the question sometimes arises as to whether the one to whom the article was delivered was agent for the donor or the donee. If the delivery is made to the agent of the donor, until there has been a delivery by the agent to the donee the gift can be revoked, or recalled, and the death of the donor before delivery by the agent would operate as a revocation

of the agency, causing the gift to be invalid. Where the delivery is made to an agent or trustee of the donee (and in some cases it is held that delivery to a third person is delivery to a trustee of the donee) the delivery is complete. A gift once perfected cannot be revoked, and no subsequent possession by the donor can give him title merely by virtue of his having been the original owner.

184. Gifts to Take Effect in Future.—A gift to take effect in the future, or upon a contingency, is generally held to be of no effect as a gift *inter vivos*; though where a gift is absolute, the donor parting with the ownership as a present gift, the fact that the donor is entitled to use the thing, or that the donee is to perform some act in regard thereto, does not invalidate the gift otherwise perfected. Such is a gift where A gives to B a deposit in bank, but with the understanding that A is to have the interest during his life, provided there is a surrender of ownership. If A has the right to withdraw any of the money there is no gift. A gift which is not to take effect until the donor's death is a testamentary disposition of property, and unless it is made in conformity with the law of wills, or other testamentary law, is invalid.

185. Donatio Causa Mortis.—A *donatio causa mortis* is a gift made in contemplation of death, revokable at any time before death and taking effect absolutely only in case the decease of the donor results from causes which led him to believe death was impending when he made the gift. As in a gift *inter vivos*, there must be an intention to give and a delivery of the thing, actual, constructive, or symbolical, showing a complete surrender of dominion over the thing; but the title in the donee is subject to being divested and reverting to the donor if death does not ensue as expected. Where property is given by will the thing is not delivered during the life

of the donor. Both a will and a gift *causa mortis* can be revoked at any time before the donor's death, but in a gift *causa mortis* there must be a complete surrender of ownership so far as such surrender is possible, during the life of the donor.

186. Almost any personal property can be the subject of a gift, but the gifts with which a banker is concerned and the phases of the law of gifts which are apt to arise in his business we desire more particularly to note. Just now, therefore, we are interested in gifts of deposits in bank, bank checks, etc.

187. The law of the place where a gift is made determines its validity.

188. Gifts can be made of funds on deposit in bank, whether represented by pass-books or certificates of deposit. *Tucker v. Tucker* (Iowa), 116 N. W., 119.

189. **What Constitutes.**—Where a desire to make a gift of a deposit is accompanied by such acts as the donor believes a complete transfer of the power and dominion over the fund, even though the money has not been transferred on the books of the bank, the intent to give, coupled with the complete surrender of the right to control the money, constitutes a valid gift. A intended to give to B money on deposit in A's name. A went with B to the bank and told the cashier of her desire to give B the money. The cashier advised A that her wishes could be carried out by giving B a power of attorney to draw out the money in A's name. This was done, and B withdrew part of the money. Creditors of A then sought to attach the balance standing in A's name, but it was held that, under all the circumstances, there was a sufficient transfer of dominion over the property, coupled with the intent to make the gift, to constitute a valid gift. *Murphy v. Bordwell*, 89 Minn., 54.

If A delivers money to a bank as a deposit for B, in-

tending to make a present gift of it to B, this is a sufficient delivery. A delivery of the pass-book to the donee is sufficient delivery, and a delivery of the pass-book with an order for the full amount of a deposit in a savings bank is generally held to be a valid gift, when coupled with the intent to make the gift, even though the donor dies before presentation of the order. So it has been held that if a depositor surrenders his book to the bank, asks the bank to transfer the account on its books to another, and takes a new book in the donee's name, this, coupled with the intent that it should vest in the donee, would in some states be held a valid gift; in others perhaps a delivery of the book to the donee would be required; while in Pennsylvania it is held that the mere delivery of a pass-book will not work a transfer; being mere evidence of an account, the delivery is not a delivery of the money. And in any event if the donor did not deliver the book because he did not mean to make it a gift during his lifetime there would be no valid gift. If the donor gives the deposit book and an order to the donee and the donee notifies the bank, this would be a valid gift in those states where the delivery of the book is construed as a delivery of the money represented. In the case of savings banks the by-laws of the bank should be complied with wherever possible, but if a gift is otherwise established, the mere fact that the assignment has not been made as required by the by-laws will not in itself defeat the gift. The omission of the assignment, when taken with other facts and circumstances, might be held to show the intention of the alleged donor. Such rules are for the protection of the bank and its depositors against fraud and mistakes, but cannot defeat the rights of parties.

190. Check.—As we noted before, death is held to revoke all unaccepted checks. And cases have held that

the donee of a check must have it turned into money before the donor's death or transfer it to a bona fide holder for value. But where a valid gift otherwise established has been completed during the life of the donor, his death before transfer will not invalidate the gift merely because one of the evidences of the gift is a check. If a check delivered as a gift has been transferred by the donee to a bona fide holder, the estate would be liable on the check, and the bank could not be held for paying same without notice.

191. **What the Courts Have Held.**—In a recent case in New York a depositor in a savings bank delivered her pass-book to the donee, with an order upon the bank to pay the donee "on producing my deposit book No. —," the full balance. It was held that this was a sufficient delivery to constitute a valid gift, though the depositor died before the book and order were presented. The bank having paid upon presentation of the book and order, it could not be held by the administrator of the deceased depositor. *McGuire v. Murphy*, 94 N. Y. S., 1005. It will be noted that there is not absolute harmony in the decisions in the different states. In some cases savings bank deposits are treated differently, but this appears to be because the bank had paid upon an order presented with the book, and the bank was entitled, under its by-laws, to a discharge upon such payment. In other cases the distinction between savings bank accounts and accounts in other banks is not drawn.

In Virginia it has been held that if A, being indebted to his son, B, makes a deposit in bank in B's name, the law will presume, in the absence of clear evidence to the contrary, that the deposit was made in payment of the debt to B, and not as a gift. If the deposit could be regarded as a gift to B, B would have a claim on the debt against the estate. It has also been held that if A owes

B and makes a deposit in B's account this is not a payment unless B consents, one case holding that where A deposits for B the bank is merely the agent of A to pay B.

If A deposits money in bank and has an entry made in the book to the effect that the money is to be paid to X upon her death, this is not a gift, as the owner did not part with the control during her lifetime. *Jones v. Crisp*, 71 Atlantic, 515. Merely adding the name of another person whose signature the bank shall pay on does not constitute a gift. *Schipper v. Kempkes*, (N. J.) 67 Atlantic, 1042. In a Connecticut case, where A intended to give B a deposit in bank, but, having lost her book, drew an order for the money as required by the by-laws, and in delivering the order to B said it was subject to her use during her lifetime, the court held that there was a sufficient transfer of ownership, notwithstanding the right of the "use" of the money during her lifetime. The court found that she was to have the profit on the money, but the gift was complete. It was B's, subject only to her right to have the interest. *Candee v. Conn. Savings Bank*, 71 Atl., 551.

A delivery of a certificate of deposit with the intention that the donee should have title thereto, is a valid gift, though the one to whom delivered for the donee retains possession until after donor's death, the donor having intended delivery. *Nelson v. Olson* (Minn.), 121 N. W., 609. But a certificate procured by A in B's name, and never delivered, may be returned by A and the money recovered. In *Basket v. Hassall*, 107 U. S., 602, the United States Supreme Court held that where A delivered to B a certificate of deposit endorsed by the payee to B, but to be paid "not until my death," this was not a valid gift *causa mortis* because, in stating that it was not to be paid until after his death the donor did not surrender control over the money or deliver it to the donee. In a gift *causa mortis*, while the property reverts to the

donor in case he recovers, yet there must be complete surrender of ownership, power or control over the thing in so far as, and to the extent that, it is possible for the donor to relinquish his present ownership. Here the donor stated that it was not to be paid until after his death. A case which seems in conflict with this, but which really is not, is the case of *Phinney v. State*, 36 Wash., 236. A, in a dying condition, desired to give a friend who had remained with him in his sickness his deposit in bank, in another state. The only possible way was by ordering the bank to pay to the donee, B. He did not know his exact balance, but thought it was more than \$4,000. He had the doctor draw a check payable to B, and delivered same to B, saying, "If I don't get over this I want Frank to get my money." He was to get the money back if he lived, but there was no string tied to the gift. B could go at once and get the money. But he could make immediate collection only by mail. A also wrote the bank, sending his book to have it balanced. The book reached the bank, but the letter with the check was delayed in reaching the bank until after the bank had been notified of A's death. A had no heirs, no next of kin, no creditors, and the state would be entitled to the money if the gift were not held valid. The court held that, under all the circumstances, this was a valid gift *causa mortis*. A intended that B should receive the money; the intention was clearly proved; there were no adverse claimants except one who claimed the money because no other did, and A had done everything possible to transfer the money to B in his lifetime. It is true that this is contrary to the law that death revokes a check. In *Pullen v. Placer County Bank*, 138 Cal., 169, the donor gave the donee a check, requesting that it be not presented until after his death. The Code in that state provides that a gift to be

valid must be accompanied by a delivery of the thing if it is capable of delivery. And besides, the donor requested that the check be not presented until his death, so there was no delivery. Where the donor retains control of the thing it is generally held that there is no gift. In the Washington case the control was surrendered as completely as the circumstances of the case would permit.

192. With these conflicting cases you will doubtless still wonder what the law is, but a careful study of the main principles that there must be an intent and a delivery will help to make the reconciliation less difficult. The relationship of the parties, the age, physical and mental condition of the donor, the circumstances under which the gift is made and the conduct evincing the donor's intent should all be taken into consideration. While the court will seek to protect rightful owners against fraud, in the absence of fraud it will endeavor to carry out the intention of the donor where that intent can be proved.

192a. **Gift to Save Administration on Estate.**—If a person desires his property, upon his death, to go to one other than those to whom the law would give it, he can provide therefor by will. If he wishes to "fix" his property so that a will and administration can be prevented, the only way he can do it is by giving the property during his lifetime. He can give it to another, to be owned jointly with himself. *Kelly v. Beers* (N. Y.), 86 N. E., 980. But if there is any string tied to it, so that he can revoke it during his lifetime, it is not a gift. Where it can be done, the bank, the donee and everybody interested should be made fully aware of the gift and a complete understanding had, that the title to the property is vested in the donee, absolutely, to be owned jointly by him with the donor, and that the survivor shall take all not withdrawn on the death of either. As such gifts,

however, are likely to be contested anyhow, a will is recommended where the amount justifies it.

193. **Check of a Third Party.**—A check drawn by A, payable to B, may be the subject of a valid gift by B to his donee, if the requirements of intent and delivery, are present; and if otherwise valid, the fact that the check was not endorsed will not invalidate the gift. And this is the law in Pennsylvania. *Rhodes et al. v. Childs*, 64 Pa., 18. And so a note of A to B can be made the subject of a gift by B, but a donor cannot give his own note, as this is merely a promise to give something and there is no consideration upon which the promise could be enforced.

CHAPTER X.—MISCELLANEOUS.

194. **False Pretenses.**—When a check is given by one who has not funds in the bank upon which it is drawn, and knows he has no funds, whether or not his act constitutes an offense for which he can be criminally prosecuted depends upon the law of the state. Generally the mere giving of a check without sufficient funds to meet it is not in itself a crime. It may be that the drawer has made an innocent mistake, or he may have an arrangement with the bank by which the check will be paid, as where he has given security for overdrafts. But where one knowingly issues a worthless check to one who, on the strength of the check, parts with money or property, he is, in most states, guilty of obtaining money or property under false pretenses. If he obtained no money or property, but gave the worthless check for an existing indebtedness, he would not be “obtaining” money or property. And it has been held that obtaining credit at a bank for a worthless check is not punishable under a statute punishing the obtaining of money under false pretenses. *Maxey v. State* (Arkansas), 108 S. W., 1135. There must be a false representation—an inducement to part with something which would not have been parted with but for the inducement offered by the giving of the worthless check—and something obtained, the obtaining of which, in such manner, is made an offense by the laws of the state.

195. **Overdrafts.**—Where a financially responsible depositor innocently draws a check for an amount in excess of what the bank owes him, or where he has made arrangements with the bank, by depositing collateral or

satisfying the bank as to his financial responsibility, to overdraw, the payment of a check in excess of the depositor's credit is justified. *City N. B. v. Burns*, 68 Ala., 267; 44 Am. Reports, 138. The bank is not under any duty to pay an overdraft. *Merchants National Bank v. National Bank of Commerce*, 139 Mass., 513.

196. **A Loan.**—An overdraft is a loan of money to the depositor who overdraws, and is payable on demand. If the officers of a corporation, or an agent, be authorized to make overdrafts, they will have implied authority to give a note for such overdrafts. *Hennesy Bros. etc., v. Bank*, 129 Fed., 557. The depositor who overdraws is liable to the bank, and where he subsequently makes a deposit without an agreement to the contrary, the deposit can be applied in payment of the overdraft. *Nichols v. State*, 46 Neb., 715; 65 N. W., 774. But no interest can be charged on an overdraft, unless there has been an agreement for interest, until payment thereof has been demanded, when interest can be recovered from the date of demand. *Casey v. Carver*, 42 Ill., 225.

197. **Care in Allowing.**—While it may be justified, no overdraft should be allowed unless the board of directors, or an officer whom they have authorized, sanctions it. An agent does not derive any authority to overdraw by simply being empowered to withdraw a deposit. *Merchants N. B. v. Nichols & Shepard Co.*, 79 N. E., 38 (Ill.). Where an overdraft is allowed without the exercise of prudence in ascertaining the financial standing of the person overdrawing, or where an officer of the bank permits another officer to withdraw, directors and officers will be held to the same responsibility as in the case of any other loans. And an overdraft may be criminal misapplication of the bank's money. *U. S. v. Heinze*, 161 Fed., 425.

198. **Receiving Deposits When Bank Is Insolvent—**

Some states have statutes which make it a criminal offense for officers of banks to receive deposits when the bank is known to be hopelessly insolvent. The wording of the statute is different in the various states, and the courts of each jurisdiction have construed the respective statutes differently. Where such statute is in force the officers of a national bank are not amenable thereto. *Easton v. Iowa*, 188 U. S., 220.

199. National Banks.—There is no statute of the United States making it a crime for a national bank to receive deposits when insolvent, but if deposits are received by any bank, state or national, when the bank is known by its officers to be hopelessly insolvent, the officers may be personally liable, and the deposits can be recovered by the depositors, provided the money can be traced into the hands of the receiver.

200. Tracing Trust Funds.—If the bank has in its vaults \$200, at the opening of business, then A deposits \$1,000, after which the bank pays to B \$700, this would leave \$500 in the bank. If there were no other transactions, and the bank was closed on account of insolvency, the \$500 coming into the receiver's hands could be recovered by A. It would be presumed that the bank paid out its own money first. For the remaining \$500 A would have a claim as a general creditor. But where a bank has apparently been insolvent for a long time, the matter of tracing funds is a difficult one, and the claimant on any transaction, whether deposit, collection item or "trust fund," must show that his money, or an amount equal thereto, has remained in the bank at all times since he deposited it, or since the bank received it, until the closing, and that it passed into the receiver's hands, who holds so much more money by reason of that transaction. In the illustration given above, if C had deposited \$100 after B withdrew the \$700, there would be \$600 in

the bank at the time of closing, but only \$500 would remain of the amount A deposited. If C does not claim his \$100 in full, this does not give A the right to the \$600, because he can only trace \$500 of his money as swelling the amount in the receiver's hands. *Lowe v. Jones*, 192 Mass., 94; *Commissioners v. Lowe*, 192 Mass., 94; *Commissioners v. Strawn*, 157 Fed., 49.

The question next arises, if \$600 is traced into the receiver's hands, but there are many whose deposits or moneys have been received when their receipt was wrongful, and none can affirmatively show that his particular money is still in the bank, how shall the fund be divided? The \$600 remains in the bank, but no one of the claimants can trace and identify it as his money. In such cases it has been held in some states that the last deposit made is to be paid first, etc., the deposits and receipts being returned in the reverse order of their receipt, and this seems the more logical deduction if tracing is to be required. *Cherry v. Oklahoma Territory*, 89 Pac., 190, 192. In one or two states it has been held that the fund should be ratably distributed among all those who claim a preference. *Piano Co. v. Auld* (N. D.), 86 N. W., 21. As there must be, first, a fund to trace, and secondly a tracing of that fund, it would seem that those claiming priority over other creditors should be required to follow their money into the hands of the receiver, or share, not in a distribution of an unidentified fund, but in the general distribution with all creditors; otherwise the money of the general creditor, who may have participated in increasing the fund in the bank, is used to pay, in full, one who has not established his right to a preference. *In re North River Bank*, 60 Hun. (N. Y.), 91; *Bayor v. Tr. & Sav. Bank*, 157 Ill., 62.

201. Where checks or other items have been deposited, if they are in the bank when the receiver takes charge,

they should be returned to the depositors, if under the same circumstances money would have to be returned; but unless the bank was hopelessly insolvent and known by the officers to be so, (*See Easton v. Iowa*, 188 U. S., 220), the depositors have become creditors of the bank and are not entitled to a return of the money or the items. *Quin v. Earle*, 95 Fed., 728. If the items would be returnable, but have been sent on the way to collection, then the proceeds when received should be turned over to the owner of the item. *Showater v. Cox* (Tenn.), 37 S. W. 286; 97 Tenn., 547.

If there be no actual cash proceeds, or no actual remittance of the amount collected, but the item was collected by a change of credits, or by checks on the same bank, the owner must prove his claim with all other creditors. *Beard v. District*, 88 Fed., 375; *Bank v. Dowd*, 38 Fed., 172. He cannot be paid in full with money that depositors have put in, or other creditors, who are no more to blame for the failure of the bank than he is. The better considered cases hold that parties who deal with banks are presumed to know and assent to the customs which banks resort to to make collections, etc. *Freemans N. B. v. Natl. Tube Works*, 151 Mass., 413; *Aebi v. Bk. of Evansville* (Wis.), 102 N. W., 329. It is not the intention of the writer to deal with collections in this volume, but the matter is adverted to here, as many items deposited, while received by the banks as deposits, must be collected by them before they are real deposits. The courts have wrangled with the question of "tracing" of trust funds, and there is still much conflict, but the statement made above is in accord with the principles which the federal courts have established and which are gradually becoming the law and the justice in the states.

202. The "Insolvent Bank" of Tightville, being hopelessly insolvent and known by its officers to be so, ac-

cepts from A a check drawn payable to A, by B, on the First National Bank of Moneyville, and gives A credit on his account. A has endorsed the check in blank. "Insolvent Bank" transmits the item to its New York Correspondent, endorsing it in the ordinary manner, "Insolvent Bank, Tightville, All prior endorsements guaranteed," etc. The New York Correspondent presents it at the National Bank of Moneyville and either receives the cash or credit to its account for the amount. The New York Correspondent in turn credits the account of the "Insolvent Bank" for the amount and notifies the "Insolvent Bank" that the item has been paid. Now there has been no money passed to the "Insolvent Bank" in the transaction and there is no "fund" which has come into the "Insolvent Bank" which can be traced. In the ordinary course of events the depositor, A, would have checked against the credit given him when he deposited the item. If it had been returned unpaid the "Insolvent Bank" could have charged it back to his account. Had the item been endorsed by A "for collection only," and with the understanding that no credit would be given until actually paid, or had there been other evidence that the item remained A's, the New York Correspondent Bank could not have treated it as "Insolvent Bank's" property, but A could follow it and recover the proceeds. But as there was no mark of title in any other than the "Insolvent Bank," upon being notified of the closing of "Insolvent Bank," the Correspondent Bank can offset the credit balance of "Insolvent Bank," including the amount of items sent for collection, unless the item shows on its face that title thereto remains in the depositor, or there is some other notice to the Correspondent Bank that the item is not the property of "Insolvent Bank," against any balance

the Correspondent Bank had in the "Insolvent Bank," or on any indebtedness owing by the "Insolvent Bank" to the Correspondent Bank in the ordinary course of business. And, while the depositor of checks on other banks usually can be charged back with the amount if the item is not collected, and he usually has only the privilege, and not the absolute right, to check against it before collected, he is, nevertheless, generally regarded as creditor of the bank until the item is charged back. *Natl. Commercial Bank v. Miller*, 77 Ala., 168; *Balbach v. Frelinghuysen*, 15 Fed., 675; *Bank v. Theummler* (Ill.), 62 N. E., 932; and cases cited in Sec. 201.

MONEY.

203. **Legal Tender.**—Gold coin is legal tender for its nominal value when not below the limit of tolerance in weight; when below that limit it is legal tender in proportion to its weight; standard silver dollars and Treasury Notes of 1890 are legal tender for all debts, public and private, except where otherwise expressly stipulated in the contract; subsidiary silver (silver coins of smaller denominations than \$1) is legal tender to the extent of \$10; minor coins (nickels and cents) to the extent of twenty-five cents in any one payment, and United States notes for all debts, public and private, except duties on imports and interest on the public debt. Gold certificates, silver certificates and national bank notes are not legal tender money. Gold and silver certificates are receivable for all public dues, and national bank notes are receivable for all public dues except duties on imports, and may be paid out for all public dues, except interest on the public debt.

204. **Fraudulent Notes.**—The act of June 30, 1876, Sec. 5, provides that all United States officers charged with the

receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the word "counterfeit," "altered," or "worthless," upon all fraudulent notes issued in the form of and intended to circulate as money which shall be presented at their places of business; and if such officer shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof.



INDEX.

(All references are to sections.)

ACCEPTANCE

see CERTIFICATION

ADMINISTRATOR

act of one binds all, 86
authority of, to deposit, 36
deposit of, 36
payment to, 179
should be appointed by local court, 180

AGENT

account of, 9, 36

ALTERATION

avoids instrument, 138
in date of check, 138
of check before certification, 130,
after, 130

AMOUNT

deposited, 38a
for which check may be drawn, 75
of check, 75
not guaranteed by bank, 142
written words prevail as to, 74

ASSIGNMENT

check generally not, 75, 150
against particular fund, 151
of deposit, 150

ATTACHMENT, 147; see GARNISHMENT

bank not subject to, 153
before judgment, 147
depositor's property, 153
items for collection, 149
money assigned by depositor, 150
money in depositor's name, 152
paid to holder of check, 105
belonging to another, 148
set aside on certification, 148

ATTORNEY

deposit of, 36

BAILMENT, 1

BALANCE AND RETURN OF PASS BOOK

Balance and return of pass book
see PASS BOOK

BANK

books, examination of, ~~37~~ 39c
can not deny ownership of depositor, 39
issue certificate of deposit, when, 42
relation of, to depositor, 1
under no duty but to pay, 100

BANKRUPTCY

preference in, 175
right of set-off in, 172

BEARER

check payable to, 65, 88

BY-LAW

can not bind depositor on mistake, 38a
valid when reasonable, 58

CASHIER'S CHECK

can not be countermanded, 100a

CASHING CHECK

on other bank, 88e

CERTIFICATE OF DEPOSIT, 40

bank can not issue when, 42
demand must be made on when, 46
due when, 46
evidence only, 48
holder of is general creditor, 12
except by statute, 12
interest on, 49
is not payment until itself paid, 49a
except to issuing bank, 49a
is payable at bank, 43
lost, 45
negotiable when, 41
payment of
on forged endorsement, 45
without endorsement, 44
statute of limitations runs when, 49
stolen (see **STOLEN CHECK**), 88
surrender should be required on payment, 43
when a loan, 50c

CERTIFICATION OF CHECK

acceptance of bank, 118
alteration of check before, 130
after, 130
attachment of deposit after, 148
bank not bound to make, 109
binding on bank when made, 122
though bank made mistake, 129
though not entered on books, 127
by whom made, 121
officer, of his own check, 123
other officer's check, 123
care in making, 129
countermand after, 99, 100, 131b
not binding on depositor when, 131b, 142
effect of, 124
false, binds bank, 131c
criminal, 131
penalty for, 131c

CERTIFICATION OF CHECK —Continued.

- forged check, 129
- for drawer, 125
 - holder, 126
 - more than drawer has to his credit, 131c
- guarantees signature of drawer, 129
 - but not endorsements, 129
- in writing but not on check, 119
- makes bank debtor to holder, 122
- must be in writing, 119
- post dated check, 122
- promise of bank to make in future, 131
- raised, 130
- verbal, 119
- what checks, 122
- what is, 120

CHECK

- acceptance of—see **CERTIFICATION**
- altered, see **ALTERATION, RAISED CHECKS**
- amount of, 74, 75
- assignment of fund when, 100
- binding only when delivered, 88
- body of, 73
- cashing, on other bank, 88e
- certification of, see **CERTIFICATION**
- certified, liability of bank on, 125
- contract contained in, 65
- corporation, 78
- countermand of, 99
- date, 67
- deposit of, in bank on which drawn, 112
 - in other bank, 88e, 201
- debtor need not accept, 118
- dishonor of, proceedings on, 88b
 - liability for, see **REFUSAL TO PAY**
- deposited for collection, 201
 - should not be sent direct to drawee, 95
- drawer should be notified when not paid, 94
- signature of, bank guarantees, 138, 140
- drawn when no funds, 98
 - excuses presentment, 91
 - fraudulent when, 194
- duplicate, 135
- essentials of, 71
- for less than one dollar, 76
 - more than deposit, 106
- form, 70
- gift of, see **GIFTS**
- in payment of gambling debt, 39b
- knowledge of outstanding, by bank, 99, 103, 108
 - post dated, 98
- liability for refusal to pay, see **REFUSAL TO PAY**
- lost, 135

CHECK—Continued.

- memoranda on, 72
- memorandum check, 131e
- must contain name of payee, 71
- not binding until delivered, 88
- number on, 72
- outstanding, bank can disregard, 108, 98
- paid, 137
- partnership, 81
- payable after date, 71
 - out of particular fund, 151
 - on demand, 62
 - in order presented, 107
- payment only when accepted as such, 89, 154
- post dated, 98, see **POST DATED CHECK**
- presentation, see **PRESENTMENT**
- presumed drawn against funds, 98
- promise to accept in future, 131
- protest of, see **PROTEST**
- revocation of, by countermand, 99
 - by death, 101
 - by insolvency, 102
- stale, 96-97
- stolen, 88 and see **LOST CHECK**, 135
- surrender of, when paid, 137
 - not until paid, 95
- transfer of, warrants, by delivery, 88b
 - by endorsement, 88b

CLEARING HOUSE CERTIFICATE

- may be counted as reserve, 57

COLLECTION

- deposit for, 16, 201, 202

CONDITIONAL DEPOSIT, see DEPOSIT, conditional**CONTRACT**

- between bank and depositor, 3, 58
- made by drunken person, 61
 - infant, 59
 - insane person, 60, 61
 - on holiday, 69a
- parties to, 59

COUNTERFEIT

- money or paper, deposited, 14
- payment in, 110

COUNTERMAND

- bank must not pay after, 99
- check subject to, 99, 100
- cashier's, 100a
- when certified, 131b

DAMAGES

- see **REFUSAL TO PAY**, 134

DATE

- alteration in, 68
- check without, 67
- of check, 67
- disregarded when, 103

DEATH

- of depositor, 177, 178
 - duty of bank upon, 179
 - revokes checks, 101
- joint owner of deposit, 85
- partner, 81, 82

DEBTOR

- bank is, to depositor, 3
- must generally seek creditor, 43
- but bank need not, 43, 64

DELAY in presentment, see **PRESENTMENT**

DELIVERY

- necessary to complete contract, 88

DEMAND

- check is payable on, 62
- failure of bank equivalent to, 163
- not necessary when bank commits wrong, 157
- should be made before statute of limitations runs
 - on certificate of deposit, 46
 - check, general deposit, 156
 - payment on raised check, 130

DEPOSITOR

- bank may choose, 26
 - terminate relation with, 26
- banks as, 25
- bankruptcy of, see **BANKRUPTCY**
- contract between bank and, 58
- death of, see **DEATH**
- government, see **PUBLIC MONEYS**
- insolvency, see **INSOLVENCY**
- presumed to own money in his name, 39
- right of, to examine bank's books, 38e
- status of on failure of bank, 5, and see **INSOLVENCY**

DEPOSITS

- attachment of, see **ATTACHMENT**, also **GARNISHMENT**
- bank, 25
- become bank's property, 1
 - as soon as passed over counter, 3
- by check on same bank, 112
 - other bank, 88e, 201, 202
- infant, 59
- joint owners, 85
- officer, see **PUBLIC MONEYS**
- postmasters, 32 and **PUBLIC MONEYS**
- one, payable to another, 8

DEPOSITS—Continued.

- (see) administrator, guardian, husband and wife, infant, insane, trustee, etc.
- classification of, 2
- conditional, 39c
 - cannot be paid until condition fulfilled, 39c
 - if not complied with, money remains depositor's, 39c
 - but compliance gives right to the deposit, 39c
 - as general depositor, 39c
- control of determines ownership, 85
- distinction between loan and, 50
- for collection, 16, 201, 202
 - special purpose of depositor, 11
- general, 3
 - may be changed to specific or special, 117
- gift of, see GIFTS
- in another's name, 39a
- individual, 25
- interest on, see INTEREST
- joint, 83
- keeping, 51
- loan, when, 50
- loose money, 3
- made without pass book, 38c
- making, 37 et seq.
- not a loan when, 50
- of decedent, 179
 - infant, 179
 - insolvent, 179
 - insane, 179
 - public moneys, see PUBLIC MONEYS
- source of, 39b
- received after banking hours, 13
 - when bank insolvent, 199
 - where kept separate, 13, 16
- receiving, when bank insolvent, 198
 - by national bank not criminal, 199
 - criminal in some states, 198
 - liability of officers for, 199
 - bank must be hopelessly insolvent, 201
- sealed package of money
 - may be special deposit, 3
- slip, see DEPOSIT SLIP
- special, see SPECIAL DEPOSIT
- specific, 15
- state, city and county funds,
 - see PUBLIC MONEYS
- to whom should be made, 37
- United States, see PUBLIC MONEYS
- where made, 37
- who entitled to, 39

DEPOSIT SLIP

- deposit made without binds bank, 38a

DEPOSIT SLIP—Continued.

- duplicate, 38c
 - not negotiable, 38c
 - raising constitutes forgery, 38c
- should always be required, 38a

DRAFT

- holder of a general creditor, 7
 - unless fraudulently issued, 7
- not payment until itself paid, 111

DRAWER OF CHECK, see CHECK, DRAWER

DRAWING CHECK, 66

DUPLICATE

- check, 135
- deposit slip, 38c

DUTY OF BANK

- only to pay, 100, 103, 109

ENDORSEMENT, 65, 88a

- by bank, 88e
- can not be insisted upon when, 65
- certificate of deposit, 44
- in blank, 65, 88a
 - makes instrument payable to bearer, 88a
- restrictive, 88a
- signature in, 88d
- special, 88a
- warranties made by, 88b, 141
- without recourse, 88c

ENTRY IN PASS BOOK, see PASS BOOK

ERROR

- diligence required after discovery of, 38d
- evidence can be introduced to show, 38a
- and see MISTAKE

ESTATE

- representative of, see 179

EXECUTOR

- act of one binds all, 86
- authority of, to deposit, 36
- should be appointed by local court, 180

EXPRESS

- money sent by, 160

FAILURE OF BANK, see INSOLVENCY

FALSE CERTIFICATION, see CERTIFICATION, false, 131c

FALSE PRETENSES

- giving worthless check, 194

FIVE PER CENT REDEMPTION FUND

- see RESERVE, 53

FORGED

- check, bank cannot charge depositor with, 138
- certification of, 129

FORGED—Continued.

paper, deposited, 14, 112

payment in, 110

FORGERY

diligence in discovering, 146

and reporting, 38d

gives no right against person whose name forged, 88, 138

but he may adopt the signature, 145

money paid on may be recovered when, 138, 139

of signature of drawer, 138-140

endorser, 141

on certificate of deposit, 45

of bank on deposit slip, 38c

payment on is no payment, 142

see **RAISED CHECKS****FRAUD**

in concealing mistake, 113

issuing check where no funds, 194

post dated check is not, 98

FRAUDULENT notes, 204**GAMBLING**

debt, check for, 39b

money won at, 39b

GARNISHMENT

bank subject to, 147

see **ATTACHMENT**

of creditor after he has given check, 154

holder of check, after payment, 105

what is, 147

GENERAL DEPOSIT, see **DEPOSIT**, general**GIFT**

by check of depositor, 190

of third party, 193

causa mortis, 185

in contemplation of death, 185

inter vivos, 183

of deposit, 188, 189

position of bank regarding, 181

to save administration, 192a

take effect immediately, 183

in future, 184

validity of depends upon what law, 187

what is, 182

can be subject of, 186

courts have held, 191

GOVERNMENT

claim of, 33

deposits, see **PUBLIC MONEYS**, 27**GUARANTY**

national bank can not make, 129

GUARDIAN

authority of to deposit, 36
should be appointed by local court, 179

HOLIDAY, contract made on, 69a
instrument due on, 67

HUSBAND AND WIFE

deposit of, 84
gifts between, see GIFTS

IDENTIFICATION

bank must make, 139

INFANT

deposit by, 59; and see 179, 180

INJUNCTION

against national bank, 153

INQUIRIES

answering, 131a
regarding certified check, 131
depositor's account, 38e
no part of bank's duty, 109

INSANE PERSON

contract of, 60
deposit by, 60, see 179, 180

INSOLVENCY

checks revoked by, 102
of bank, equivalent to demand and refusal, 163
loss upon check on, 89
renders depositor creditor of bank, 4 et seq.

INSOLVENT

receiving deposits when, 198, see DEPOSITS, receiving
right to offset against, see SET OFF

INTEREST

due from time of demand, 163
none payable unless contracted for, 163
on certificate of deposit, 49
general deposit, 163
overdraft, 196
public moneys of U. S., 31
when bank fails, 163
commits wrong, 164

JOINT DEPOSITS, 83

LAWFUL MONEY RESERVE, see RESERVE

LEGAL TENDER

payment must be in, 110
what is, 203

LIABILITY OF BANK

does not attach until deposit received, 161
on certified check, see CERTIFICATION
certificate of deposit, see CERTIFICATE of DEPOSIT

LIABILITY OF BANK—Continued.

check, see CHECKS

deposits, see DEPOSITS

not limited in amount, 50b

refusal to pay check, see REFUSAL TO PAY

special deposit, 20

LIEN AND SET OFF, see also SET OFF

attaches when debt is due, 166, 170

bank entitled to when, 165

of U. S. on circulating notes, 33

on collections, 166

notes presented for discount, 168

securities obtained for special purpose, 167

in regular course of business, 165

pledged as collateral, 167

special deposit, 167

right to attaches when, 170

in some states under contract only, 170

not until notice given, 170

what may be subject to, 171

LIMITATIONS, see STATUTE OF LIMITATIONS

LOAN

distinguished from deposit, 50

when statute prohibiting does not prevent deposit, 50

LOSS

on account of failure to present check, 89, 91, 93

failure of bank, see INSOLVENCY

LOST

certificate of deposit, 45

check, 135

duplicate issued for, 135

rights and liabilities under, 135

payable to bearer or endorsed, 136

when not, 136a

MAIL

deposit made by, 161

remittance made by, 160, 162

MARRIED WOMAN

can contract in most states, 59

MEMORANDUM CHECK, 131e

MISTAKE

by-law can not bind depositor to, 38a

can not be claimed when, 116

fraud or concealment of, 113

in crediting item, 114, 38a

making payment, 113

can be recovered when, 113

not when mistake of law, 117

not presumed, 117

of post dated check, 115

money paid by, 113, 117

MISTAKE—Continued.

question of fact whether there has been, 117
should be promptly reported, 38d
when checkholder should have discovered, 117

MONEY

counterfeit is no payment, 110
debtor entitled to receive in payment, 118
fraudulent notes, 204
legal tender, 203

MONEY ORDER FUNDS, 34

NAME, see SIGNATURE

in which deposit stands, see DEPOSITS
endorsement, see SIGNATURE

NATIONAL BANK

depositors in, general creditors, 4
false certification of check by, 131
may become public depository, see PUBLIC MONEYS

NEGOTIABLE INSTRUMENT

certificate of deposit is when, 41
deposit slip is not, 38c
pass book is not, 38b

NOTE PAYABLE AT BANK

equivalent to order to bank to pay, 173

NOTICE

of refusal to pay check, 94, see REFUSAL TO PAY

NUMBER ON CHECK, 72, see CHECKS

OFFICER

deposit of, see DEPOSITS and PUBLIC MONEYS

OFFSET, see SET OFF

ORDER

to pay deposit, form of, 63
may be verbal, 63
should be in writing, 63
and see CHECKS

OVERDRAFT

bank under no duty to allow, 195
though it has previously done so, 107
care in allowing, 197
deposit made after may be applied in payment, 196
drawer liable to bank on, 196
interest on, 196
is loan payable on demand, 196
justified when, 195
may be criminal, 197
note given in payment of valid, 196

OWNERSHIP OF DEPOSIT

see DEPOSIT, who entitled to, 39

PARTNERSHIP

death of partner dissolves, 82

PARTNERSHIP—Continued.

- each partner in is agent for all, 81
- has authority to draw checks, 81
- in name of partnership, 81
- not for individual debt, 81
- funds of, 81
- surviving partner of has authority to withdraw, 82

PASS BOOK

- balance and return of, 38d
- diligence in discovering error upon, 38d
- deposit made without, 38c
- entries in, 38
- evidence only, 38a
- not binding when, 38a
- is not negotiable, 38b

PAYEE

- the one to whom check is payable
- must be named in check, 71

PAYMENT

- certificate of deposit is, when, 49a
- check is not until itself paid, 89, 154
- but is payment to bank on which drawn, 154
- draft is not until paid, 111
- money only need be accepted in, 118

PAYMENT OF CHECKS, 103

- by draft, 111
- mistake, 113, and see MISTAKE
- can be required at bank only, 62
- completed when money passed over counter, 105
- drawn by one holding power of attorney, 79
- duty of bank to make, 103 et seq.
- for more than deposit, 106, 107
- in forged or counterfeit paper, 110
- made by bank at its peril, 87a
- must be in legal tender, 110
- in order checks are presented, 103, 107
- of deceased depositor, see DEATH of depositor
- DRUNKEN, INSANE, INSOLVENT persons,
- see these titles and CHECKS
- on forgery, see FORGERY
- post dated, 115
- raised, 142
- refusal to make, see REFUSAL TO PAY
- to wrong person, 116, 117, 142
- deemed acceptance by bank when, 132
- wrongful, makes bank liable to depositor, 117, 143
- usually gives holder no right against bank, 143

PAYMENT OF DEPOSITS

- after death of depositor, see DEATH
- agreement regarding controls, 85
- bank makes at its peril, 85
- must be on order of owner only, 39

PAYMENT OF DEPOSITS—Continued.

order for, see ORDER

usually by check, see CHECKS

POSTMASTER, deposit by, see PUBLIC MONEYS

POST DATED CHECK

can not be certified, 98, 122

paid before its date, 69, 98

change in date of, 69

is valid, 69, 98

POWER OF ATTORNEY

payment of checks on, 79

to draw deposit of another, 80

deposit does not authorize withdrawal, 80

written should be required, 80

PREFERENCE

in bankruptcy, see BANKRUPTCY

PRESENTMENT

certificate of deposit, 47

check, 89

delay in, 89, 91

excused when, 93a

throws loss upon whom, 91-93

excused when, 91, 93b

failure to make, 91, 92

must be made at bank, 89

during banking hours, 89

within reasonable time, 89

of more than one check at a time, 107

should always be made promptly

what is reasonable time for, 90, 92

when collected through clearing house, 90

holder knows bank is failing, 90

negotiated, 92

when drawer loses nothing, 93

PROTEST

not necessary, 88b

except where check drawn in another state, 88b

when payee is refused payment, 94

usually made however, 94

PUBLIC DEPOSITARY

see PUBLIC MONEYS

PUBLIC MONEYS

deposits of, 27

authority of officer to make, 10, 27

of bank to receive, 27

how kept, 27

liability of bank for, 10, 27, 27b

when unauthorized, 27b

of officer making, 10, 27

officer may make when, 27, 27b, 50

should always be carried as such, 27a

PUBLIC MONEYS—Continued.

- government a creditor for, 10
 - unless wrongfully deposited, 27
- of City, County and State, 27
 - national bank may receive when, 28
- of the United States, 29
 - application to become public depository, 30
 - banks must pay interest on deposits of, 31
 - deposits of, how kept, 30
 - unauthorized, 35
 - penalty for, 35
 - by certain postmasters, 32
 - at postmaster's risk, 33
 - do not give government preference, 33
 - unauthorized receipt of, 35a
- security required for, 29
- statutes relating to should be carefully followed, 27
 - of the United States relating to, 27 et seq.

RAISED CHECK

- certified, 130, 131b
 - money paid on can be recovered, 130, 142
- depositor can not be charged with payment of, 131b, 142

RECEIVING DEPOSITS

- see DEPOSITS, receiving

RECEIVER

- account of, 36
- should be appointed by local court, 179

REFUSAL, TO PAY CHECK (same rules apply to any proper order)

- damages against bank for, 134
- justified when not sufficient funds, 106
 - by reason of setoff against debt, 133, 170
 - attachment of deposit, 133
 - items charged back, 134
 - though books show otherwise, 38a, 170
- liability of bank for, 132
 - to depositor, 133
 - holder of check, 132
 - conditional upon presentment and actual refusal, 134
- notice of should be given, 94, and see PROTEST
- qualified, 134
- who liable for loss upon, see PRESENTMENT, 89

RELATION OF BANK TO DEPOSITOR, 1, 3

REMITTANCE

- by express, mail, etc., 160

REPRESENTATIVE OF ESTATE, 179, 180

RESERVE, 51

- agent, 56
- city, 55
 - central, 55
- purpose of, 51

RESERVE—Continued.

- required by national banks, 52
 - in reserve cities, 52, 55
 - central reserve cities, 52, 55
 - all other banks, 52
 - none against circulating notes, 53
 - public moneys on deposit, 54
 - what may be counted as, 55, 57
 - by reserve city banks, 55
 - central reserve city banks, 56

RESERVE CITY, see RESERVE

REVOCATION, see CHECK, revocation of

SET OFF and see LIEN

- against claim acquired after insolvency, 174
- allowed against owner of deposit only, 171a
- cannot be made before debt is due, 173a
- in case of insolvency of bank, 175
 - depositor, 172
 - bankruptcy of depositor, 175
- may be waived, 176
- of deposit balance, 165
 - of partnership against individual debt, 171a
 - public officer, 33
 - who has settled his accounts, 27
- proceeds of collection, 166
- what is, 169
- see NOTE PAYABLE AT BANK

SIGNATURE, 77

- may be made by pencil, 77
 - stamp, 77
 - printed, 77
- of corporation, 78
 - depositor, bank must know, 138
 - guaranties, 140
 - record of should be kept, 87a
 - who can not write, 77
 - drawer not guaranteed
 - when cashing check on other bank, 88e
 - endorser not guaranteed by bank, 141
 - prior party guaranteed by endorsement when, 141
- power of attorney to make, 79
- should be made how, 88d
- unauthorized, see FORGERY

SPECIAL DEPOSIT, 18

- agreement should be made regarding, 23
- care required of bank in keeping, 20
 - without compensation, 20
- liability of bank for, 20
- may be changed to general or specific, 17
- not assets of bank, 22
- power of bank to receive, 19
- returning, 21

SPECIAL DEPOSIT—Continued.

- what is not, 5, 11
- may be subject of, 24
- when is deposit special, 23

SPECIFIC DEPOSIT, 15

- can be used for specific purpose only, 15
- remains property of depositor, 16
- recovery can be had when, 16
- what is, 15

STALE CHECK, 96, 97**STATUTE OF LIMITATIONS**

- begins to run when, 155
- on certificate of deposit, 46
 - certified check, 128
 - deposit, 156
 - unpaid check against drawer, 158
 - refusal of bank to pay, 156
 - wrong committed by bank, 157
- what is, 156

STOLEN

- certificate of deposit, see 45 and 88
- check, 88
- deposit, 13
- money received on deposit, 39b

SUIT

- demand should be made before, 156, see **DEMAND**

SUM PAYABLE, 74**SUNDAY**, see 67**TRUSTEE**

- account as, 9
- how kept, 36
- one can not make contract for several, 87

TRUST FUNDS, 36, 39b

- tracing, 200

UNITED STATES

- not a preferred creditor on deposits, 33
- statutes of are given under proper headings

VERBAL

- certification of check, see **CERTIFICATION**
- order to pay deposits, see **ORDER**

WORTHLESS CHECK, 194**WRITING**

- in body of check, 73
- not guaranteed by bank, 142
- order for payment of deposit should be in, 63

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